

4. Enforcement of the Tier 2 and Interim Corporate Average NO_x Standards

We are finalizing, as proposed, that manufacturers can either report that they meet the relevant corporate average NO_x standard in their annual reports to the Agency or they can show via the use of NO_x credits that they have offset any exceedance of the corporate average NO_x standard. Manufacturers will also have to report their NO_x credit balances or deficits.

The averaging, banking and trading program will be enforced through the certificate of conformity that the manufacturer must obtain in order to introduce any regulated vehicles into commerce. The certificate for each test group will require all vehicles to meet the applicable Tier 2 emission standards from the applicable bin of the Tier 2 program, and will be conditioned upon the manufacturer meeting the corporate average NO_x standard within the required time frame. If a manufacturer fails to meet this condition, the vehicles causing the corporate average NO_x exceedance will be considered to be not covered by the certificate of conformity for that engine family. A manufacturer will be subject to penalties on an individual vehicle basis for sale of vehicles not covered by a certificate. These provisions will also apply to the interim corporate average standards.

As outlined in detail in the preamble to the final NLEV rule, EPA will review the manufacturer's sales to designate the vehicles that caused the exceedance of the corporate average NO_x standard. We will designate as nonconforming those vehicles in those test groups with the highest certification emission values first, continuing until a number of vehicles equal to the calculated number of noncomplying vehicles as determined above is reached. In a test group where only a portion of vehicles are deemed nonconforming, we will determine the actual nonconforming vehicles by counting backwards from the last vehicle produced in that test group. Manufacturers will be liable for penalties for each vehicle sold that is not covered by a certificate.

During phase in years, the certificates will also require manufacturers to meet the applicable phase-in requirements. Compliance with the phase-in requirements will be enforced in the same manner as for the corporate average NO_x standard. For the optional phase-in requirement for HLDTs for model year 2004, manufacturers must declare in their application for certification whether they intend to comply with the interim requirements for all of their HLDTs and initiate phase-

in to the interim corporate average NO_x standard in 2004 and receive the benefits of that phase-in (less stringent NMOG standards for certain LDT2s and LDT4s). Compliance with this phase-in requirement and the fleet average NO_x standard will be enforced just like compliance with any other average NO_x standard and phase-in requirement of today's program.

We will also condition certificates to enforce the requirements that manufacturers not sell NO_x credits that they have not generated. A manufacturer that transfers NO_x credits it does not have will create an equivalent number of debits that it must offset by the reporting deadline for the same model year. Failure to cover these debits with NO_x credits by the reporting deadline will be a violation of the conditions under which EPA issued the certificate of conformity, and nonconforming vehicles will not be covered by the certificate. EPA will identify the nonconforming vehicles in the same manner described above.

In the case of a trade that results in a negative credit balance that a manufacturer could not cover by the reporting deadline for the model year in which the trade occurred, we proposed, and are finalizing, to hold both the buyer and the seller liable. This is consistent with other mobile source rules, except for the NLEV rule as discussed below. We believe that holding both parties liable will induce the buyer to exercise diligence in assuring that the seller has or will be able to generate appropriate credits and will help to ensure that inappropriate trades do not occur.

In the NLEV program we implemented a system in which only the seller of credits would be liable. In the preamble to the final NLEV rule (*See* 62 FR 31216), we explained that a multiple liability approach would be unnecessary in the context of the NLEV program given that the main benefit to a multiparty liability approach would be to "protect against a situation where one party sells invalid credits and then goes bankrupt, leaving no one liable for either penalties or compensation for the environmental harm." Our preamble stated further that EPA would not necessarily take the same approach for "other differently situated trading programs."

The NLEV program was implemented to be a relatively short duration program, during which time we could expect relative stability in the industry. Also, given that NLEV is a voluntary program of lower than mandated standards, we did not expect that the smallest manufacturers would opt in.

These are the companies whose stability is most in jeopardy in a dynamic and very competitive worldwide business.

We currently believe that the Tier 2 program and its framework will remain for many years. We note that the program is not scheduled for complete phase-in for almost nine years after the publication of today's rule. All manufacturers, large and small, will ultimately have to meet the Tier 2 standards. We cannot predict that in the Tier 2 timeframe there will not be companies that leave the market or are divided between other companies in mergers and acquisitions. Thus we believe it is prudent to implement a program to provide inducements to the seller to assure the validity of any credits that it purchases or contracts for.

J. Addressing Environmentally Beneficial Technologies Not Recognized by Test Procedures

Compliance with the current and proposed EPA motor vehicle emission standards is based on the emission performance of a vehicle over EPA's prescribed test procedure. While this test procedure addresses many of the aspects of a vehicle's impact on air quality, it does not address all such impacts. EPA is aware of two developing technologies which have potential to improve ozone-related air quality, but that would not do so over the current EPA test procedure.

The first example is a device that removes ozone from the air as the vehicle is driven. A major producer of automotive catalysts, Englehard, has developed a catalytic coating for vehicle radiators (called PremAir) that converts ambient ozone to oxygen. ARB has been working with Englehard for some time to develop a procedure which would grant PremAir and other direct ozone reducing technologies a NMOG credit under its LEV I and LEV II programs. ARB issued on December 20, 1999 a Manufacturers Advisory Circular outlining procedures for establishing such a NMOG credit.

Englehard submitted substantial comments to the Tier 2 NPRM, including ozone modeling results for five cities (Los Angeles, Houston, Atlanta, New York City, and Chicago). This ozone modeling compared the ozone reductions from reduced exhaust VOC and NO_x emissions to that from using PremAir. As a result of this modeling, Englehard requested that EPA grant a typical PremAir system a NMOG or NO_x emission credit of 0.015 g/mi. This credit would be adjusted based the exact design and performance of the system and vehicle being certified.

The second example is an insulated catalyst. The insulation retains heat for extended periods of time, increasing the catalyst temperature when the engine is started and reducing the time required for the catalyst to reach an operational temperature. This technology can reduce cold start emissions for engine off times (called soaks) of 24 hours or less. The vast majority of engine soaks in-use are less than 24 hours. However, EPA's test procedure only tests emissions at two fairly extreme soak times: 10 minutes and 12–36 hours. The 10 minute soak is so short that even an uninsulated catalyst is warm enough to quickly begin working upon restart. The 36 hour soak is beyond the practical limit of cost-effective insulating techniques. As a result of the Tier 2 NPRM, EPA received a number of inquiries from potential manufacturers of insulated catalysts, requesting further information about emission credits, test procedures and certification requirements.

EPA believes that both of these technologies, as well as other potential technologies, will reduce regulated emissions and/or ambient ozone levels, as long as they operate as designed in-use. EPA will work with the developers of such technologies to establish regulatory procedures to determine whether it is appropriate to grant emission credit for particular technologies. This process will involve the opportunity for public notice and comment.

With regard to Englehard's PremAir technology, EPA specifically requested comments on ARB's proposed approach to determining an NMOG credit and received no adverse comment on granting this type of technology a VOC emission credit. Thus, EPA is promulgating today procedures very similar to ARB's for certifying such technologies and determining the appropriate VOC emission credit. The only difference between EPA's and ARB's procedures involve assessing the effectiveness of VOC emission reductions and ozone reducing devices in areas outside of California.

In summary, the ozone reductions associated by both the ozone reducing technology, such as PremAir, and exhaust VOC emission reductions will be estimated using urban airshed modeling, using up-to-date chemical and meteorological simulation techniques. Four local areas shall be modeled: New York City, Chicago, Atlanta and Houston. The ozone episodes to be modeled shall be those selected by the states for use in their most recent ozone SIPs. Emissions shall be projected for calendar year 2007.

Baseline emissions will include the benefits of the Tier 2 and sulfur standards being promulgated today, as well as all other emission controls assumed in EPA's ozone modeling of the benefits of the Tier 2 and sulfur standards described above. The ozone benefit of VOC emission reductions will be modeled by assuming that Tier 2 LDVs and LDTs meet a 0.055 g/mi exhaust NMOG standard instead of a 0.09 g/mi NMOG standard. The relationship between changes in exhaust NMOG emission standards and in-use VOC emissions shall be determined by modeling LDV+LDT emission in 2030 assuming that all Tier 2 vehicles meet a 0.055 g/mi exhaust NMOG standard instead of a 0.09 g/mi NMOG standard. All emission modeling shall utilize the updated Tier 2 emission model developed by EPA as part of this rule, or MOBILE6, once it is available. The measure of ozone to be used in calculating VOC emission equivalency will be the peak one-hour ozone level anywhere in the modeled region on the day when ozone is at its highest. The NMOG credit will be determined by averaging the NMOG credit determined in each of the four local areas.

Simulation of the benefits of the direct ozone reducing device will assume that ozone levels immediately around the roadway will be 40% less than that existing in the broader grid. The performance aspects of the direct ozone reducing device can be simulated by any reasonable values, since the appropriate NMOG credit for any specific application of this technology will be scaled to the performance of the specific application.

The manufacturer wishing to obtain an NMOG credit for use of this technology must demonstrate its effectiveness to EPA as part of the certification process. This will involve demonstrating the air flow through the device, its ozone destruction capability under conditions analogous to those photochemically modeled, the durability of this capability over the useful life of the vehicle and the method to be used to diagnose its effectiveness in-use.

Regarding the insulated catalyst technology, less information has been received to date on its performance. We are not promulgating regulations for determining the appropriate credit for such technology today. However, when we were developing our SFTP standards, EPA developed a methodology to assess the emission benefits of insulated catalysts or other techniques which reduced emissions after the vehicle soaks between 10 minutes and 12–36 hours. Thus, EPA

expects to use this methodology as a starting point in assessing the benefit of insulated catalysts and will continue to assess development of options in this area. Because an insulated catalyst operates essentially like a typical catalyst, we do not expect that the test procedures for its certification would differ from those applicable to typical Tier 2 vehicles. The primary difference will be an assessment of its effectiveness relative to conventional catalyst technology over a range of vehicle soak times between 10 minutes and 36 hours. Then, it will be necessary to estimate the average effectiveness in-use relative to conventional technology using the in-use frequency of vehicle soak times.

K. Adverse Effects of System Leaks

The standards set forth in today's final rule are very stringent. They require extremely tight control of air/fuel ratios and also tight control of the inputs to the catalyst(s). A sealed exhaust system is crucial to the proper operation and emission control of current vehicles and even more so to the expected Tier 2 vehicles. Because a given point in the exhaust system intermittently sees negative pressure, exhaust leaks can permit air to enter the exhaust system. Even tiny amounts of air entering this way can have large impacts on the output of the oxygen sensor. If the output of the oxygen sensor is affected, then the exhaust output of the cylinders will be affected. Consequently, an exhaust leak can lead to both excess NO_x and NMOG emissions. Air entering through exhaust leaks can also impact the NO_x conversion efficiency of catalysts.

In the preamble to the NPRM, we expressed our concerns about the impact of small exhaust leaks and requested comment on design or on-board monitoring measures we could finalize to ensure that exhaust systems were manufactured and installed in such a way that leaks are prevented. We also asked for comment on whether we should implement a provision that would require manufacturers to demonstrate through engineering analysis or design that the possibilities of exhaust leaks have been addressed.

Manufacturers indicated in their comments that they believe addressing exhaust leaks is unnecessary. We believe otherwise. Data we have seen suggest that very large emission effects can occur due to very small leaks. Consequently, we are finalizing a provision in today's rule that will require, as part of the certification process, for manufacturers to indicate that they have conducted an engineering analysis of the exhaust system. This

analysis must cover the entire exhaust system, including air injection systems, from the engine block exhaust manifold gasket surface to a point beyond the last catalyst or oxygen sensor. This analysis must determine whether the exhaust system has been designed to facilitate leak-free assembly, installation, repair and operation for the full useful life of the vehicle.

With regard to the concept of "facilitating leak-free repair", we intend that manufacturers should ascertain that the exhaust system can be removed in a dealership or repair shop for repairs to the exhaust system itself or to other components of the vehicle and be able to be reassembled and reinstalled in a leak free manner using commonly available tools. It is not our intention that the concept of "facilitating leak-free repair" apply to situations of gross misuse, tampering or serious vehicle damage.

L. The Future Development of Advanced Technology and the Role of Fuels

The EPA staff will continue to assess the emission control potential of vehicles powered by technologies such as lean-burn and/or fuel-efficient technologies, including diesel engines equipped with advanced aftertreatment systems, gasoline direct injection engines, and other technologies that show promise for significant advances in fuel economy and meeting the Tier 2 standards in the post-2004 time frame. In this assessment, we will maintain a "systems" perspective, considering the progress of advanced vehicle technologies in the context of the role that sulfur in fuels plays in enabling the introduction of these advanced technologies or maximizing their effectiveness.

M. Miscellaneous Provisions

We are finalizing, as proposed, to continue existing emission standards from Tier 1 and NLEV that apply to cold CO, certification short testing, refueling, running loss, and highway NO_x. We are discontinuing, as proposed, the 50 degree (F) standards and testing included in the NLEV program. The 50 degree standards are a part of the NLEV program because that national program adopted California requirements virtually in their entirety. These standards had not previously been part of any federal program. We are also discontinuing idle CO standards for LDTs, based upon comment. These standards are adequately covered by the certification short test standards.

VI. Gasoline Sulfur Program Compliance and Enforcement Provisions

A. Overview

The gasoline sulfur program promulgated today has many of the same features as the reformulated gasoline/conventional gasoline (RFG/CG) program, including refinery averaging, refinery and downstream level caps, and the generation and use of credits. These features raise similar compliance issues for both programs. As a result, the enforcement mechanisms of the gasoline sulfur rule generally track those of the RFG/CG rule, where applicable. Because low sulfur gasoline is necessary to avoid significant impairment of Tier 2 motor vehicle emissions technology, we believe measures are needed to assure that gasoline meets the standards promulgated in today's rule at the time the gasoline leaves the refinery gate or is imported, and to assure that the quality of the gasoline is maintained downstream of the refinery.

More specifically, today's rule includes the following provisions:

- Refiners and importers must test each batch of gasoline produced or imported for sulfur content and maintain testing records and retain test samples;
- Refiners and importers must submit reports regarding compliance with the average standards and credit provisions;
- Attest procedures¹²⁵ similar to those of the RFG/CG rule will be applied to the sulfur standards and credit provisions;
- Refiners and importers are prohibited from using, selling or purchasing invalid sulfur credits, and are required to adjust compliance calculations if invalid credits have been used, sold or purchased;
- Small foreign refiners subject to the small refiner standards described in section IV.C. above must comply with the rule's small refiner compliance requirements and other requirements to ensure the separation of such foreign gasoline from all other gasoline to the U.S. port of entry; any foreign refiners participating in the early credit generation program must also meet certain provisions concerning credit generation, including reporting and recordkeeping;
- All regulated parties in the gasoline distribution system who are downstream from the refiner or importer must comply with downstream sulfur cap standards;

• Regulated parties are subject to presumptive liability for violations at a party's own facility and for violations at other facilities that could have been caused by the regulated party; branded refiners are subject to liability for violations occurring at branded facilities.

• Refiners and distributors may implement downstream quality assurance testing to assure compliance and to establish an element of defense against presumptive liability.

As in other fuels programs, the sulfur standards apply to all motor vehicle fuel that meets the definition of gasoline, except for aviation fuel and racing gasoline, as was proposed in the NPRM. See 40 CFR 80.2(c). Gasoline sulfur standards apply, however, to gasoline that is ultimately used in nonroad equipment or marine engines.

As we noted in the NPRM, we are aware there are certain fuels, such as aviation fuel and racing fuel, that are generally segregated from gasoline throughout the distribution system. Where such fuels are segregated from motor vehicle gasoline and not made available for use in motor vehicles, the fuel is not subject to sulfur rule standards. However, if such fuels are not segregated throughout the distribution system, but are used as motor vehicle gasoline or are commingled with motor vehicle gasoline, then any person who introduces such fuels into the gasoline distribution system is a refiner, subject to all the refiner requirements of today's regulations, including registration, reporting, testing and meeting the national refiner average and cap standards for the volume of gasoline that person added to the distribution system. Today's rule adopts the provisions concerning fuel used for racing vehicles as proposed.

One commenter suggested that racing gasoline or aviation gas should be allowed to be used as motor vehicle gasoline by downstream parties so long as the racing gasoline or aviation gas does not exceed the applicable downstream cap standard. We disagree. Racing gas that meets the applicable downstream sulfur cap would nevertheless not be subject to the refinery gate cap or averaging standards, and may not meet such standards. Allowing such fuels to be distributed for motor vehicle use would thus circumvent the intent of the rule.

The rule promulgated today clarifies the definition of "refinery" at 40 CFR 80.2(h), as was proposed in the NPRM. We received no comments on this clarifying change. Specifically, section 80.2(h) now provides that "refinery"

¹²⁵ 40 CFR Part 80, subpart F.

means any facility, including a plant, tanker truck or vessel where gasoline or diesel fuel is produced, including any facility at which blendstocks are combined to produce gasoline or diesel fuel, or at which blendstock is added to gasoline or diesel fuel. This is consistent with all current EPA fuels rules, interpretations, policies and question and answer documents.

Oxygenate Blenders

In the NPRM we proposed that oxygenate blenders¹²⁶ would not be subject to the refiner sulfur standard like other blenders, because we felt it unlikely that oxygenates will have sulfur levels that will raise the sulfur content of the gasoline. This approach also was proposed because gasoline is the denaturant normally used to produce denatured ethanol. However, we received comments that denatured ethanol may contain as much as 50 ppm sulfur, which could result in significant increases in sulfur content from ethanol blending alone.

While it is true that some of today's gasoline has a sulfur content as high as 1,000 ppm which if used as an ethanol denaturant results in ethanol having a sulfur content of 50 ppm, the average sulfur content of gasoline is about 300 ppm which if used as an ethanol denaturant results in ethanol with a sulfur content of 15 ppm. In addition, when the gasoline sulfur standards being promulgated today are in effect, the average sulfur levels of gasoline will be significantly reduced, which will further reduce the sulfur content of denatured ethanol to very low levels. For this reason, we are finalizing the regulation as proposed that oxygenate blenders are not subject to refiner sulfur standards.

However, if gasoline blendstock instead of finished gasoline is used as a denaturant for ethanol the oxygenate blender who adds the ethanol would become a "refiner," who is required to demonstrate compliance with the sulfur standards for the denatured ethanol added to gasoline. This is because the oxygenate blender would be adding a blendstock along with the ethanol, which subjects the blendstock blender to refiner standards and requirements. Moreover, if the blendstock has a high sulfur content the denatured ethanol could have a sulfur content greater than 30 ppm, or even greater than 80 ppm, which could make compliance by such a "refiner" difficult or impossible. In addition, as discussed above, in certain cases ethanol is included in the refinery

compliance calculations of the refiner who produced the gasoline or RBOB with which the ethanol is blended. Refiners assume this ethanol has no sulfur content, an assumption that could be incorrect if high sulfur blendstock is used as the denaturant.

For these reasons we believe it is important that ethanol blenders use denatured ethanol with a sulfur content of 30 ppm or less, which would occur if the current practice of using finished gasoline as ethanol denaturant continues. In order to ensure this result, the regulations include a provision that prohibits ethanol blenders from using denatured ethanol with a sulfur content greater than 30 ppm. We believe ethanol blenders can comply with this requirement through commercial arrangements with their ethanol suppliers, that specify the maximum sulfur content of denatured ethanol. In addition, ethanol blenders can assure compliance with this requirement by testing to determine the sulfur content of denatured ethanol received.

Gasoline Treated as Blendstock (GTAB)

One commenter suggested that the Agency policy under the RFG/CG rule that allows certain imported gasoline to be treated as a blendstock by importer-refiners should be applied to today's rule. The GTAB policy was originally issued in the RFG Question and Answer document, and was subsequently published as part of a proposed RFG rulemaking in 1997.¹²⁷ We intend to address GTAB issues in that RFG rulemaking, including issues regarding compliance with today's rule.

Transmix

We are aware that when gasoline meeting the requirements finalized in today's rule is transported through pipelines, there will be some situations where adjacent distillate product in the pipeline will mix with a portion of the gasoline to create an interface product, commonly referred to as transmix. This transmix may not be blended into the diesel fuel because the gasoline in the transmix may result in diesel fuel performance problems. Historically, this type of transmix product has either been blended into the gasoline, in limited concentrations, or the transmix has been separated into its gasoline and distillate components at a reprocessing plant. However, the practice of blending the transmix into gasoline may result in violations of the downstream standards

for RFG, and such blending could violate the downstream sulfur caps finalized in today's rule, because many distillates have a very high sulfur content. Therefore, we believe regulatory provisions are needed to resolve these issues. We have not addressed transmix issues in today's rule because we have already proposed regulations regarding transmix blending and processing in another rulemaking.¹²⁸ We plan to address transmix issues, including issues regarding compliance with today's rule, in that rulemaking, which we plan to finalize in the near future.

Inability To Produce Conforming Gasoline in Extraordinary Circumstances

Several commenters suggested the rule should include a provision, similar to the RFG rule provision at 40 CFR 80.73, to address situations where, due to extraordinary circumstances, a refiner or importer cannot produce or distribute conforming gasoline. Section 80.73 applies to refiners, importers and oxygenate blenders. Today's rule has adopted the provisions of section 80.73 for RFG and CG, for importers and refiners, but not for oxygenate blenders. This is because the gasoline sulfur program does not include provisions that would be expected to require oxygenate blender relief.

In the remainder of this section we discuss enforcement issues regarding today's rule that are not covered in this Overview or in section IV.C., above.

B. Requirements for Foreign Refiners and Importers

In the NPRM we proposed that standards for gasoline produced by foreign refineries that are not subject to small refiner individual refinery standards would be met by the importer. Standards for gasoline produced by a foreign refinery subject to an individual sulfur rule standard would be met by the foreign refinery, with certain limited exceptions as provided in the foreign refinery provisions. The rule promulgated today adopts the provisions as proposed, except for several changes aimed at clarifying the proposed requirements, changes relating to the temporary relief provision, and changes relating to foreign refiners' participation in the early credit program. These provisions are very similar to the foreign refinery provisions of the RFG/CG rule.

¹²⁶ The term "oxygenate blenders" includes "ethanol blenders."

¹²⁷ Reformulated Gasoline and Anti-dumping Questions and Answers, (11/12/96); Proposed Rule for Modifications to Standards and Requirements for Reformulated and Conventional Gasoline; 62 FR 37337 et seq. (July 11, 1997).

¹²⁸ 62 FR 37337 et seq. (July 11, 1997) (proposed 40 CFR 80.84).

1. Requirements for Foreign Refiners With Individual Refinery Sulfur Standards or Credit Generation Baselines

Under the RFG/CG rule, EPA promulgated regulations¹²⁹ addressing the establishment and implementation of individual baselines for CG produced by certain foreign refiners. The purpose of these regulations is to ensure the compliance of gasoline supplied from foreign refineries with individual compliance baselines. It includes comprehensive controls, requirements and enforcement mechanisms to monitor the movement of gasoline from the foreign refinery to the U.S., to monitor gasoline quality and to provide for enforcement as necessary.

In the NPRM, we proposed similar requirements for compliance with the applicable sulfur standards that would apply to any foreign refiner who demonstrates that it meets the sulfur program's small refiner criteria. We proposed that foreign refinery baselines would be based on annual average sulfur levels and the volume of gasoline imported to the U.S. during the same baseline period as would be applicable to domestic small refiners. In today's final rule we have also adopted provisions for foreign refiners to establish baselines to participate in the early credit generation program, and to request temporary relief. Any foreign refiner who obtains a foreign refinery gasoline sulfur baseline would be subject to the same requirements as domestic refiners with individual refinery baselines under today's rule. Additionally, provisions similar to the provisions at 40 CFR 80.94 would apply, which include:

- Segregating gasoline produced at the small refinery until it reaches the U.S.;
- Refinery registration;
- Controls on product designation;
- Load port and port of entry testing;
- Attest requirements; and
- Requirements regarding bonds and sovereign immunity.

The rationale for these enforcement provisions is discussed more fully in the Agency's preamble to the final RFG/CG foreign refineries rule (62 FR 45533 (Aug. 28, 1997)).

Several commenters suggested that the rule should have even stronger enforcement provisions concerning foreign refiners, including criminal provisions against foreign individuals who violate the requirements of the rule. While we agree that the rule's enforcement provisions pertaining to

foreign refiners must be effective, we believe the proposed enforcement provisions are sufficient, and that attempts to further strengthen them would not significantly increase their overall effectiveness. Today's rule imposes various requirements on foreign refiners not required of domestic refiners, as noted above, which we believe are more effective for ensuring environmental compliance than criminal provisions would be for foreign individuals, in light of the potential difficulties of enforcing sanctions against foreign individuals. EPA's experience to date with the similar RFG/CG requirements under section 80.94 of the RFG/CG rule does not indicate the provisions are inadequate.

Therefore, today's rule generally retains these provisions as proposed. The final rule makes several technical changes, including changes regarding baselines for foreign refiners, to be consistent with the requirements for domestic small refiners and refiners generating early credits finalized in today's rule. The rule's foreign refiner enforcement provisions now also apply to foreign refiners participating in the early credits program, and to the use of credits by foreign small refiners.

One commenter stated that the language of the proposed § 80.410(n) would be too broad in that prohibiting any "person" from combining certified small foreign refiner gasoline with non-certified small foreign refiner gasoline or with certified small foreign refinery gasoline produced at a different refinery would prohibit even retail level commingling of such products. This was not intended and today's rule clarifies that such commingling can occur subsequent to importation.

Under the proposal, when the small refiner standards sunset (and additionally under today's rule, when the temporary refiner relief provisions sunset),¹³⁰ all gasoline would be subject to a single national averaged standard and one national refinery level cap. Thereafter, standards for all imported gasoline would be met by U.S. importers. We have retained this provision as proposed. With a single national average standard and cap standard, gasoline sulfur content can most readily be monitored at the U.S. importer level, since there will no longer be a special class of gasoline with different standards that would need to be monitored.

¹³⁰ Small refiner and temporary refiner hardship individual refinery standards sunset January 1, 2008, except for any small refineries that receive a hardship extension not to exceed two years.

2. Requirements for Truck Importers

Today's final rule adopts the proposed requirement for importers to sample and test each batch of gasoline imported. However, as noted in the preamble to the NPRM, for parties that import gasoline into the U.S. by truck, the every-batch testing requirement would include testing the gasoline in each truck compartment, or if the gasoline is homogeneous, testing the gasoline in the truck.

In the NPRM we recognized that this every-batch testing requirement may not be feasible for truckers hauling many small loads of gasoline, and we therefore proposed a limited alternative approach for truck importers in lieu of every-batch testing. The proposed alternative approach is based on the importer meeting the 30 ppm sulfur standard on a per-gallon basis. Under this alternative approach, the importer would be allowed to rely on the sulfur results based on sampling and testing conducted by the operator of the foreign truck loading terminal. Because, in most cases, the terminal operator will not be subject to United States laws, we also proposed safeguards intended to ensure that the gasoline in fact meets the applicable standard. This includes the requirement that the importer conduct a quality assurance sampling and testing program independent from the sampling and testing conducted by the terminal. Under this approach the reporting requirements would be minimized since no averaging would be required. The environmental consequences of this approach would be neutral, because by meeting the 30 ppm sulfur standard on an every-gallon basis the standard also would be met on average.

One commenter stated that the 30 ppm per-gallon standard would be difficult for truck importers to meet due to the fact that Canadian terminals may not always have gasoline with a sulfur content no greater than 30 ppm. The commenter suggested that truck importers be allowed to rely on testing conducted by the foreign gasoline terminal, as discussed above, to meet the average and cap standards like other importers.

We agree that truck importers may have difficulty obtaining gasoline that meets the 30 ppm sulfur standard on a per-gallon basis. Under Canadian regulations, Canadian refiners will be subject to a 150 ppm average standard and a 300 ppm cap in 2004, and in 2005 Canadian refiners will be subject to a 30 ppm average standard and an 80 ppm

¹²⁹ 40 CFR 80.94.

cap.¹³¹ This means that truck importers should be able to meet the standards applicable to other importers, including the ultimate average standard and cap standard under today's rule (30 ppm average and 80 ppm cap), without great difficulty. However, meeting a per-gallon cap of 30 ppm might be difficult since the sulfur content of gasoline in the storage tanks of Canadian terminals, like those of U.S. terminals, will likely exceed 30 ppm at times, even after the 30/80 standards are implemented. We have concluded that we can address this concern by providing additional flexibility to truck importers, and still assure compliance.

While today's rule retains the proposed alternative, with some modifications, it also provides a second alternative approach. Under this second approach, truckers are allowed to meet the national average and cap applicable to other importers, and rely on testing conducted by the foreign gasoline terminal so long as all the other requirements applicable to the proposed alternative approach are complied with. In addition, truckers using this second alternative approach will be subject to more extensive reporting than required for the proposed alternative, since the importer will have to demonstrate compliance with the annual average sulfur standard applicable to other importers.

One commenter urged that truckers should be subject only to the national downstream cap. We cannot agree to this approach as it is not environmentally neutral relative to the national standards in effect for other importers and refiners. If truck importers were required to meet only the downstream cap, sulfur levels for their imported gasoline could be substantially higher than for other importers, which could have a detrimental environmental consequence.

One commenter stated that the 30 ppm per-gallon standard for truck importers should not go into effect until the 30 ppm standard becomes the national average standard for refineries and other importers. We agree. Under today's rule, the per-gallon standards applicable to truck importers under the proposed alternative will be the same sulfur level as the sulfur average standard that applies to other importers (in 2004 there is no average standard; however, truck importers using this alternative compliance approach must meet the corporate pool standard on a

per-gallon basis).¹³² Under the second alternative approach, the truck importer will be subject to the same average standard and cap standard applicable to other importers.¹³³

Similar provisions as provided above apply to truck importers for gasoline subject to the geographic phase-in area (GPA) standards (see section IV.C. of this preamble for a discussion of GPA standards). However, because of the small volumes of truck-imported gasoline, and the consequent difficulty in meeting corporate pool averages for a trucker who imports gasoline into both the GPA and areas outside the GPA, today's rule requires that for truck importers using the averaging option, the corporate pool average does not have to be met. The 150 ppm average standard and the 300 ppm cap standard apply to gasoline imported by truck into the GPA in 2004 through 2006. For truck importers meeting the per-gallon standard option for gasoline imported into the GPA, the per-gallon standards are 150 ppm for 2004 through 2006.

Truck Import of Foreign Small Refiner Gasoline

The NPRM addressed issues associated with gasoline produced by a foreign small refinery with an individual baseline and certified as subject to the refinery's individual interim standard (S-FRGAS), and imported by truck. The proposed requirements for S-FRGAS included segregating the gasoline from all other gasoline from the refinery gate to the U.S., so that compliance with standards can be tracked. For ordinary, non-truck importers, each batch of certified S-FRGAS must be tested at the load port and port of entry. Today's rule finalizes these proposed requirements for S-FRGAS.

However, in the case of gasoline imported by truck, the NPRM acknowledged that the testing and other procedures proposed for certified S-FRGAS may not be feasible. As a result, we proposed an alternative to the requirement for testing every truckload of imported certified S-FRGAS, and to other importer requirements. This alternative approach includes a requirement that small foreign refiners producing any S-FRGAS that will be imported by truck submit a petition to EPA that includes a plan which is

designed to ensure that certified S-FRGAS remains segregated from all other gasoline from the refinery to the U.S. Rather than specifying the precise requirements of such a plan in the regulations, we proposed to allow the refiner to develop its own procedures for ensuring that S-FRGAS remains segregated. However, the plan must contain certain elements, such as product transfer documents which identify the origin of the gasoline and prohibit its commingling with any product other than certified S-FRGAS from that refinery.

This approach also requires the refiner of such truck-imported gasoline to receive and maintain all such product shipment documents, including U.S. import documents, for five years and review these to ensure that segregation is maintained until reaching the U.S. To ensure that refiners conduct this review, we proposed to require the refiner's plan to include attest audit procedures to be conducted annually by an independent third party.

We received no comments on this proposal for ensuring the integrity of S-FRGAS imported by truck. Today's final rule adopts the petitioning provision to permit alternative segregation procedures for S-FRGAS imported by truck as proposed since we continue to believe that it will provide flexibility to foreign refiners and to importers and will adequately assure enforceability.

C. What Standards and Requirements Apply Downstream?

We proposed per-gallon cap standards that would apply to all parties in the distribution system downstream of the refinery and importer level, including pipelines, terminals, oxygenate blenders, distributors, carriers, retailers and wholesale purchaser-consumers. We believe that downstream cap standards and compliance monitoring based on downstream standards are needed to ensure that the sulfur level of gasoline remains below the cap level when dispensed for use in motor vehicles, to avoid adverse emissions consequences that would be caused by the use of gasoline having a sulfur content above the cap level. The following discussion addresses downstream standards generally, downstream standards and requirements for gasoline produced by refineries subject to standards under § 80.240 and 80.270, and downstream standards and requirements for gasoline produced or imported for the geographic phase-in area (GPA).

¹³² In 2004, a 120 ppm cap; In 2005 and beyond, a 30 ppm cap. See Table IV.C.-1.

¹³³ In 2004, a 120 ppm average standard and a 300 ppm cap; In 2005, a 30 ppm average standard, a corporate pool average no greater than 90 ppm, and a 300 ppm cap; In 2006 and beyond, a 30 ppm average standard and a 80 ppm cap. See Table IV.C.-1.

¹³¹ Vol. 133 23/6/99 C. Gaz. II, 23 June 99 (pp. 1469 et seq.)

Determination of Downstream Cap Standards

We proposed that the downstream standards would be more lenient than the refinery-level cap standards so that refiners and importers can produce gasoline that equals the refinery-level cap standard. We did so because it has been EPA's experience that if a refiner produces gasoline that equals, or almost equals a standard, that gasoline may be shown to violate the standard when subsequently tested at a location downstream of the refinery due to testing variability. As a result, parties downstream of the refinery (primarily pipelines) set commercial specifications for the quality of the gasoline they will accept that are more stringent than the standard that applies to the downstream party. This, in effect, forces refiners to produce gasoline that is "cleaner" than the refinery-level standard.

In other fuels programs (for example, the benzene per-gallon standard for RFG) we resolved this concern by announcing enforcement tolerances for fuels standards that apply downstream of the refinery-level, thereby reducing the need for pipelines to set specifications more stringent than the refinery level standards. We believe that having more lenient downstream standards will have the same effect as enforcement tolerances.

In the NPRM we proposed that the values of the downstream cap standards would reflect the testing variability that could reasonably be expected when different laboratories test gasoline for sulfur content; that is, lab-to-lab variability, or reproducibility. Industry commenters supported this approach, and today's rule adopts this approach. For gasoline subject to the 80 ppm refinery-level sulfur cap, the downstream maximum standard is 95 ppm. This difference reflects the reproducibility established by the American Society for Testing and Materials (ASTM).¹³⁴ For gasoline subject to refinery-level sulfur caps higher than 80 ppm, which will be the case for gasoline produced before 2006 and for gasoline produced by certain small refineries through 2007, the downstream cap is similarly established by using ASTM reproducibility data. The national downstream cap is 378 in 2004, when the refinery level cap can be as high as 350 ppm. The national downstream cap in 326 in 2005, when the refinery level cap is 300.

Because these downstream caps are based on sulfur test reproducibility, we intend to amend the rule in the future if improvements in test precision are made for the designated method. We may also consider amending the rule to make some other method the designated method if a more precise method is available in the future.

The Proposed Downstream Standards Compliance Scheme

Under the proposal, if gasoline produced by a small refiner with a less stringent cap standard is mixed in the distribution system with gasoline subject to the national cap standard, the entire mixture would then be subject to the higher cap standard, even though most of the gasoline, at the refinery level, would be subject to the more stringent national cap standard. We proposed that during the period that small refinery individual standards are in effect, for gasoline that is comprised, in whole or in part, of small refiner gasoline with a higher sulfur cap standard than the national cap standard, product transfer documents (PTDs) would specify that the gasoline is small refiner gasoline and the level of the downstream cap applicable to the gasoline.

The purpose of the proposed provisions was to make it possible to determine the standard that applies to any gasoline downstream of the refinery. If the gasoline contains no small refiner gasoline, the downstream standard would be based on the national cap. If the gasoline is comprised, in whole or in part, of small refiner gasoline subject to a less stringent cap standard, the downstream standard would be based on this less stringent cap standard. As gasoline is mixed and remixed in the fungible distribution system, the percentage of gasoline that is small refinery gasoline will progressively diminish until the fungibly mixed gasoline meets the national downstream cap. Therefore, we proposed in the NPRM that a downstream party may no longer classify gasoline as containing small refiner gasoline if a test result shows the sulfur content of the gasoline is below the applicable national (i.e., not small refiner) downstream cap.

Several commenters suggested that this tracking scheme would be unworkable. Some of these comments were based on the belief that the proposal intended to require segregation of the small refiner gasoline through the distribution system. The proposal was not intended to require that small refiner gasoline must be segregated, and under today's final rule there is no

requirement that small refiner gasoline must be segregated from gasoline produced by other refiners. Some commenters also believed that testing by downstream parties would be required under the proposed rule. These commenters were concerned that a downstream testing requirement could be costly and could delay distribution of gasoline. This latter point is addressed later in this discussion. Some commenters stated that the proposed PTD provisions of the downstream enforcement scheme were too complex and that some means other than changing PTD designations should be found to track small refiner gasoline.

Other commenters, including automobile manufacturer trade associations, stated they believed that EPA enforcement and testing downstream of the refinery is necessary to assure that gasoline complies with standards at the retail gasoline pump.

We have carefully considered the comments and we have concluded that the tracking scheme as proposed would not be effective because most pipeline shipments are expected to include some small refiner gasoline (although the amount of small refiner gasoline may comprise less than 1% of the shipment) and therefore, most of the gasoline in the nation might be classified as small refiner gasoline, even though only a small fraction of the supply will actually be small refiner gasoline. Therefore, a downstream cap much less stringent than the national downstream cap would attach to most gasoline produced to meet the national refinery standards, and the scheme would not be effective in monitoring whether the quality of most gasoline is maintained after it enters the gasoline distribution system.

The proposed scheme could lead to other unintended results. The gasolines contained in a fungible mixture in the distribution system may not be fully mixed and homogenous. As a result, a distinct, unmixed, portion of gasoline within a fungible mixture could be small refiner gasoline with a sulfur content above the national downstream cap, while other parts of the fungible mixture would meet the national downstream cap. This is especially true for fungible mixtures in pipelines and could also be true for gasoline in storage tanks. If a test result for a sample collected from part of such a fungible mixture in a pipeline shows compliance with the national downstream cap, under the proposed rule the entire mixture would become subject to the national downstream cap, and the pipeline PTDs could not classify the gasoline as small refiner gasoline. Thus,

¹³⁴ ASTM standard method D 2622-98, entitled "Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-ray Fluorescence Spectrometry."

under the proposal, parties downstream of the pipeline could be subject to liability because they might receive small refiner gasoline not meeting the national standard even where a pipeline PTD does not represent that the gasoline is small refiner gasoline. That was not intended by the proposal.

Because of these difficulties, we concluded that the proposed scheme must be modified to address these concerns, in order for there to be effective enforcement of the downstream standards. We are concerned that the quality of gasoline will be affected downstream of the refinery. Gasoline may be contaminated with high sulfur blendstocks or other high sulfur products such as distillates after it leaves the refinery gate. There is likely to be an economic incentive for some downstream parties to sell or use gasoline or blendstocks that have a higher sulfur content than the national downstream standard. The inability to monitor downstream compliance would result in environmental degradation that is not intended by the rule, and in an inability to assure a level playing field for all parties in the gasoline distribution industry.

Tracking Gasoline Downstream of the Refinery

We believe that an effective downstream compliance and enforcement scheme is necessary in order to achieve the full emissions reduction benefits of the rule. Today's rule modifies the proposed tracking scheme so that compliance with the program can be monitored.

Under today's rule, all gasoline downstream of the refiner or importer is subject to the national downstream standard unless a different downstream standard, based on the highest sulfur content of any small refiner/temporary refiner relief gasoline in the gasoline mixture (as determined by the small refiners' batch testing), is supported by PTDs and a test result confirming the presence of small refiner/temporary refiner relief gasoline. The test result must be for gasoline sampled from the downstream facility classifying the gasoline as small refiner gasoline, unless the facility is a trucker, retailer or wholesale purchaser-consumer. We have concluded that this requirement is necessary to monitor compliance with the downstream standards during the period that small refiner/temporary refiner relief standards are in effect, because the vast majority of the gasoline transported by pipelines will be gasoline produced to comply with the

national cap,¹³⁵ even though most of those pipeline shipments will be classified as small refiner gasoline.¹³⁶

We believe that the ability to track small refiner gasoline is made even more important due to the geographic phase-in area (GPA) gasoline provisions finalized today.¹³⁷ GPA gasoline is subject to less stringent refiner/importer standards than gasoline produced for use in other parts of the country. Therefore, its use is limited to the GPA states. However, it may be produced or imported at any location in the country before it is transported for use in the GPA. EPA would have little ability to assure GPA-designated gasoline is only being used in the GPA if it cannot determine if gasoline at a downstream location outside the GPA that exceeds the applicable downstream cap for non-small refiner gasoline, is in fact small refiner gasoline or if it may include gasoline that was designated for use in the GPA but has been diverted for use elsewhere. The tracking requirements for small refiner gasoline will help us to make that determination.

The only parties required to perform testing in order to demonstrate that a shipment, or tank, of gasoline contains small refiner gasoline are gasoline pipelines and terminals. Where a terminal properly classifies gasoline in its storage tank as small refiner gasoline, and subsequently receives a load of gasoline into that tank, it may not continue to classify the gasoline as small refiner gasoline unless the tank is sampled, and a test demonstrates that the tank still contains small refiner gasoline and the gasoline sulfur content exceeds the national refinery level cap. In 2004 the test result would have to exceed 350 ppm; in 2005, 300 ppm; and starting with 2006, 80 ppm. In the GPA, the test result would have to exceed 350 ppm in 2004, and 300 ppm in 2005 and 2006.

We have concluded that the pipeline and terminal testing provisions are necessary for effective enforcement. We believe that terminals and pipelines will be able to perform sampling and testing that will enable them to identify the

presence of small refiner gasoline in a cost-effective manner. These parties have knowledge regarding the mixing of gasoline as it moves from the pipeline and into the terminal tank, and knowledge of the distribution system, that will enable them to make judgments regarding the extent of testing that may be needed to demonstrate whether gasoline meets the national downstream cap. Further, a terminal operator may take additional tests if it believes a tank may contain a stratified portion of small refiner gasoline, despite a test result showing the tank complies with the national downstream cap.

Many terminals may have sufficient reason to believe they are receiving only gasoline meeting the national cap such that they will not normally test each receipt of gasoline. Additionally, even for terminals who receive small refiner gasoline, we do not believe the sampling and testing will be burdensome. This is partly because many terminals already conduct periodic sampling, or even sampling after every delivery of gasoline into storage tanks, at least in the summer VOC or RVP season, to test gasoline for various parameters, which may already include sulfur testing in RFG areas. Field test instruments already exist that are adequate for this testing in 2004 and 2005 when the national downstream cap is 378 ppm and 326 ppm, respectively. Moreover, we believe that because of today's rule, better field test instruments for sulfur analysis at lower levels are likely to be developed in the next few years. Therefore, it will not be necessary for quality assurance samples to be sent to a laboratory for testing. Thus, we do not believe shipments will be held up while terminals await a test result. We also believe that it is likely that these instruments will be available for a cost that will be far less than most laboratory instruments available today.

Under today's rule, retailers are not required to conduct testing. The retailer can demonstrate that the gasoline is properly designated small refiner gasoline subject to a less stringent downstream standard by maintaining PTDs from its suppliers that demonstrate a terminal classified gasoline supplied to the retailer's storage tank as small refiner gasoline.

Downstream Standards and Requirements for GPA Gasoline

Consistent with the way today's rule sets downstream sulfur standards for other gasoline, the GPA program downstream standard is determined by adding the ASTM reproducibility applicable to the refinery level sulfur

¹³⁵ For example, most pipeline shipments are expected to contain small refiner gasoline in the two U.S. pipelines that carry the highest volume of gasoline. However, in most shipments the small refiner gasoline is expected to account for substantially less than 5% of the total volume of gasoline in the shipment.

¹³⁶ For purposes of this discussion, "small refiner gasoline" includes any gasoline from a refiner to whom EPA grants relief based on a showing of extreme hardship.

¹³⁷ See section IV.C. of this preamble for refiner/importer standards and the discussion below regarding downstream compliance and enforcement provisions.

cap to that refinery level cap, which for GPA gasoline is as high as 350 ppm in 2004, and 300 ppm in 2005 and 2006. This results in downstream standards for GPA gasoline of 378 ppm in 2004, and 326 ppm in 2005 and 2006.

Because GPA gasoline must be used only within the GPA states,¹³⁸ today's rule requires that refiners and importers producing or importing gasoline subject to the GPA standards must designate each such batch of gasoline as GPA gasoline and segregate such batches from all other gasoline. Product transfer documents must identify the gasoline as GPA gasoline so that all downstream parties will be aware that it must be sold or distributed for use only in the GPA.

Gasoline produced for use in all areas of the country outside the GPA may be sold for use in the GPA, including gasoline subject to small refiner standards under section 80.240 of today's rule.

Where GPA gasoline is commingled with other gasoline, the commingled gasoline must be classified as GPA gasoline and used only in the GPA states. Where GPA gasoline is commingled with S-RGAS, the applicable downstream sulfur standard for that gasoline is the greater of the GPA downstream standard or the applicable small refiner/temporary refiner relief standard as determined under section 80.210 of the rule.

Lead-Time for Downstream Compliance With New Standards

Some commenters stated that there should be a lead-time of several months between the implementation date of a new refinery level sulfur standard and the implementation date of the corresponding downstream standard. Based on our experience with other fuels programs, we believe that a one-month lead time will be adequate for gasoline at the terminal level to meet new standards. An additional one month for retailers will give them ample time to comply. Therefore, under today's rule, the 378 ppm downstream sulfur standard (or any applicable small refiner downstream cap standard) is effective February 1, 2004 at the terminal level and March 1, 2004 at the retail level. The 326 ppm downstream sulfur standard is effective February 1, 2005 at the terminal level and March 1, 2005 at the retail level. The 95 ppm downstream standard is effective February 1, 2006 at the terminal level and March 1, 2006 at the retail level (or February 1, 2007, and March 1, 2007,

respectively, in the case of gasoline at facilities in the GPA).

Retail Gasoline Pump Labeling

EPA believes gasoline advertised as being "low sulfur gasoline" when sold at retail outlets should have a sulfur content of no more than 95 ppm because this is the maximum sulfur level of gasoline at retail outlets that would protect the emission controls of Tier 2 vehicles. We are stating this to inform refiners and other regulated parties, when making advertisement decisions regarding gasoline, that it is EPA's position that effective January 1, 2004, if any retailer represents that gasoline is low sulfur gasoline, or representations to the same effect, the gasoline sulfur content should be no greater than 95 ppm.

D. Testing and Sampling Methods and Requirements

1. Test Method for Sulfur in Gasoline

We proposed ASTM standard method D 2622-98, "Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-ray Fluorescence Spectrometry," as the primary method for testing sulfur in gasoline by refiners and importers. This is the designated method under the RFG/CG rule.¹³⁹ We also requested comment on adopting other methods as the primary method, in particular, ASTM method D 5453-93, "Standard Test Method for Determination of Total Sulfur in Light Hydrocarbons, Motor Fuels and Oils by Ultraviolet Fluorescence," and ASTM D 4045, "Standard Test Method for Sulfur in Petroleum Products by Hydrogenolysis and Rateometric Colorimetry," which is used under the California fuels program for sulfur levels below 10 ppm. We also proposed ASTM D 5453 as an alternative method for determining the sulfur content of gasoline and we requested comment on this proposal.

Most comments supported the continued use of ASTM D 2622 as the designated method for testing sulfur in gasoline under the various fuels rules, including today's rule. Commenters indicated that most refineries outside of California are currently using ASTM D 2622. Under the California fuels regulations, California refineries currently use ASTM D 5453, as well as ASTM D 2622 and ASTM D 4045. Comments were generally favorable to the proposed use of ASTM D 5453 as an alternate method. However, one California refinery, an automobile manufacturers association and a

manufacturer of analytical equipment stated that ASTM D 5453 should be the primary method, primarily due to its greater precision at low sulfur levels. Favorable comments were received to the use of ASTM D 4045, especially for gasoline sulfur content of 10 ppm or less. One commenter suggested that ASTM D 5623-94 should be allowed; one commenter suggested that ASTM D 3120 should be allowed, and one commenter suggested that ASTM D 6428 should be allowed. Several commenters stated that we should utilize a performance based criteria system to determine what test methods can be used.

We have considered the comments carefully. We believe there are a number of test methods for determining the sulfur content of gasoline that may eventually be shown to be as good as, or better than, ASTM D 2622. We also considered that the Agency is likely to issue a proposed rulemaking for a performance-based test method approach that would apply to motor vehicle fuel parameters. This rule, once promulgated, would set forth criteria for determining whether an alternative analytical test method could be used instead of the designated analytical test method for a given fuel parameter and would set forth criteria for correlating alternative analytical test methods to the designated analytical test method.

We believe it is appropriate that alternate analytical methods should be qualified and correlated to the regulatory method according to standardized criteria. Today's rule therefore provides that ASTM D 2622, the recognized standard analytical method for determining sulfur in gasoline, is the sole regulatory method, anticipating that a performance-based testing rule may be issued before 2004, and that under its terms anyone will be able to qualify and correlate additional testing methods. We do not believe this will result in undue hardship for several reasons. First, our current fuels rules already provide that ASTM D 2622 is the sole regulatory method for determining the sulfur content of gasoline. Second, California refineries currently using ASTM D 5453 or ASTM D 4045 will not face any hardship because today's rule allows the use of approved California test methods by California refineries.¹⁴⁰ Third, today's rule allows continued use of composite samples for sulfur testing for CG during the period of early credit generation, and therefore refineries currently using outside labs to test composite samples,

¹³⁸ As stated in section IV.C. of this preamble, the GPA states are Alaska, Idaho, Montana, North Dakota, Wyoming, Utah, Colorado and New Mexico.

¹³⁹ See 40 CFR 80.46(a). Today's rule updates the former designated test method, ASTM D 2622-94.

¹⁴⁰ See preamble discussion in section VI.E., below.

but who may elect to conduct testing in-house when the every-batch sulfur testing requirement is implemented, will not need to determine whether a less expensive alternative to ASTM D 2622 is available for several years. Last, if a performance-based test method rule is not issued by the Agency in the near future, then we may reconsider this issue in a subsequent rulemaking.

We also believe that a standardized approach for determining the appropriateness of alternate test methods, correlation methodology and quality control criteria for alternate test methods would be the most fair approach to the test equipment manufacturers and to the purchasers of testing equipment. It should result in a level playing field for competition among manufacturers of test equipment. We already know that ASTM D 5453 can be purchased for about half the price of ASTM D 2622 equipment, and competition may result in even less expensive equipment.

Some commenters suggested that where a refiner or importer uses ASTM D 2622 to test gasoline, and where the test result is less than 10 ppm, the refiner or importer should be able to report a test result of zero or perhaps use a default value of 5 ppm. This sort of approach has been allowed under the RFG and Anti-dumping Question and Answer Document. However, we disagree with the commenters that this practice is appropriate under the sulfur rule. Under the sulfur rule, with a refiner average standard of 30 ppm, it is important whether a bias is consistently drawn in favor of zero ppm as opposed to 10 ppm. This could artificially increase the number of credits earned or could allow more batches to be produced by the refiner that are near the 80 ppm cap. We believe that any imprecision of sulfur values derived from analysis using ASTM D 2622, will, over the course of numerous batches, average out to near zero. Further, we believe that the precision of ASTM D 2622 is likely to be improved by 2004. Also, by 2004 there may be other methods that will be shown to be precise at low sulfur levels that may be made available for use under a performance-based test method rule. Under today's rule the refiner or importer must report the test result that the test method provides, so long as the result is not less than zero (in which case a result of zero would be reported).

If alternative methods are ultimately made available for use under a performance based rule, refiners and importers who are producing or importing gasoline with low levels of sulfur may desire to use an alternative

test method for low sulfur levels, especially if ASTM D 2622 is less precise at such levels. Under today's rule, if any approved alternative method is used for this purpose, a party could not choose to use the test result from ASTM D 2622 when its result is lower, and the test result from the alternative method when its result is lower. For any alternative test method that is eventually approved, if the party uses it for a certain range of sulfur concentrations, and ASTM D 2622 for another range, it must be consistent in such use. For example, if the alternate method were used for test results below 10 ppm, its result would always have to be used for sulfur levels below 10 ppm and ASTM D 2622 would always have to be used for sulfur levels greater than 10 ppm.

2. Test Method for Sulfur in Butane

We proposed the use of ASTM standard test method D 5623-94¹⁴¹ as the designated method for testing the sulfur content of butane and requested comment on whether this method should be the designated method. Although some butane suppliers or refiners currently use this method, several commenters stated that many refiners do not have ready access to ASTM D 5623 and that it is not necessarily the most precise method for determination of low levels of sulfur in butane. Commenters suggested at least three other methods are equal to ASTM D 5623. These are ASTM D 2784, ASTM D 4468, and ASTM D 3246.¹⁴² One commenter also suggested that ASTM D 3227-92,¹⁴³ should be allowed. Several commenters requested that EPA at least allow alternative test methods for quality assurance testing.

We have reviewed the suitability of ASTM D 5623 and agree that it is not the best method for testing for sulfur content in butane. ASTM D 5623 measures sulfur compounds rather than total elemental sulfur, and the current ASTM 5623 method is specified for liquid fuels, not gaseous fuels.

ASTM D 2784 does not seem to be a better method than ASTM D 5623.

¹⁴¹ ASTM D 5623, entitled "Standard Test Method for Sulfur Compounds in Light Petroleum Liquids by Gas Chromatography and Sulfur Selective Detection."

¹⁴² ASTM D 2784, entitled "Standard Test Method for Sulfur in Liquefied Petroleum Gases"; ASTM D 4468-85(1995), entitled "Standard Test Method for Total Sulfur in Gaseous Fuels by Hydrogenolysis and Rateometric Colorimetry"; and ASTM D 3246-96, entitled "Standard Test Method for Sulfur in Petroleum Gas by Oxidative Microcoulometry."

¹⁴³ ASTM D 3227, entitled "Mercaptan sulfur in Gasoline, Kerosine, Aviation Turbine, and Distillate Fuels". The commenter suggested it should be allowed with the use of the x-ray finish.

Commenters stated that ASTM D 2784 is not the most precise method and that it is not widely used. We believe there may be some difficulty in even obtaining the apparatus for ASTM D 2784. ASTM D 3227 is not appropriate since it is designed for measuring a single sulfur compound, and it is currently designated for testing liquid samples.

We believe that ASTM D 4468 appears to be a good method for testing butane for sulfur levels below 20 ppm. However, dilution would be necessary to test for sulfur levels above 20 ppm. This may be problematical, since it may be difficult to dilute a gaseous fuel. We expect that under today's rule, butane being tested will frequently have sulfur content in excess of 20 ppm. Several other methods exist that might work well for testing for sulfur content of gaseous fuels, but their current scope does not include determination of sulfur in gaseous fuels.

ASTM D 3246-96, which was suggested by API and NPRA as a suitable method, is an appropriate method for measuring gaseous compounds and provides test results for total elemental sulfur. Its range is 1.5 to 100 ppm, which is ideal for testing for the alternative 30 ppm butane sulfur standard applicable to butane blenders promulgated in today's rule.¹⁴⁴

After considering the strengths and weaknesses of all the available options we believe ASTM D 3246 is the best currently-available method. Therefore, today's rule makes ASTM D 3246 the designated method for testing the sulfur content of butane or other gaseous blendstocks. As discussed above, we anticipate that a performance-based test method rule for motor vehicle fuel parameters may be promulgated before 2004, and that the efficacy of other methods would be demonstrable under that rule. However, if that is not the case, the Agency may reconsider the issue of appropriate alternate test methods in a future rulemaking.

3. Quality Assurance Testing

Several commenters urged that alternate test methods be allowed for quality assurance test purposes. Under today's rule, the use of alternate test methods for quality assurance testing for purposes of establishing a defense to liability, for butane quality assurance testing under section 80.340(b)(4), and for determination of whether gasoline is small refiner gasoline, is allowed, so long as the alternate test method is correlated to the regulatory test method, the method is ASTM approved, and the

¹⁴⁴ Discussed in section VI.D.3.

protocols under the method are followed. However, the regulatory method is required for the truck importer quality assurance testing under section 80.350(c).

4. Requirement To Test Every Batch of Gasoline Produced or Imported

We proposed in the NPRM that refiners and importers¹⁴⁵ would be required to sample each batch of gasoline produced or imported and perform a test on each sample to determine the sulfur content prior to the gasoline leaving the refinery gate or importer facility. We received comments on several aspects of this proposed requirement.

Several commenters urged that we continue to allow composite sampling and testing for sulfur. Some refiners commented that the requirement to test each batch would raise testing costs. However, one refiner commented that every-batch testing for sulfur would not be a substantial burden so long as every-batch testing for other CG parameters is not required.¹⁴⁶ This commenter stated that testing for sulfur content is much less complex than testing for certain other CG parameters.

We believe that with a refinery gate sulfur cap combined with refinery averaged standards, there is no realistic alternative to every-batch testing. The Agency has no way to know whether a composite sample that is tested and found to meet the applicable refinery cap included a sample from an individual batch of gasoline that was introduced into commerce that exceeded the cap by a factor of 2 or 3. Further, we believe that with averaged standards for refiners and importers, and with multiple cap standards in effect during the phase-in period, monitoring compliance without every-batch testing would be impossible even if we could somehow be assured that no individual batch significantly exceeded the applicable refinery level cap.

We realize that there will be an additional cost associated with testing every batch of CG—for sulfur content (this is already required for RFG). However, we believe less expensive test methods for sulfur content already exist, and may continue to be developed, that will likely be acceptable as alternative methods in the future, as discussed above. Therefore, today's rule retains the requirement for every-batch testing. Under today's final rule, the test results for each batch of gasoline will be used

to determine compliance with the applicable refiner/importer cap standard and to calculate the refiner's or importer's annual average sulfur level. Any batch of gasoline that exceeds the applicable sulfur cap cannot be distributed or sold in the U.S. (unless it is exempted from the standards under today's rule, as described in section VI.G., below).

Refiners who use computerized in-line blending methods objected to the proposed requirement for a batch test before the gasoline is released from the refinery. These commenters stated that refiners using the sophisticated in-line blending practice cannot produce a complete batch test until a portion of the batch is already past the refinery gate. These commenters did not urge that we eliminate the requirement for every-batch testing, but urged that the sulfur rule adopt the RFG rule provisions for in-line blending found at 40 CFR 80.65(f)(4), for both RFG and CG.

We believe that the importance of assuring compliance with the refinery level cap is such that the rule must generally require that gasoline must be tested for sulfur content before it leaves the refinery. Based on experience under the RFG rule, we do not believe that the requirement to test each batch before it is released will substantially increase the cost of testing or cause delays in shipments.

However, today's rule recognizes the unique circumstances involved in computerized in-line blending. We believe that with appropriate safeguards, compliance with sulfur standards for gasoline produced by refineries using in-line blending can be assured. Therefore, today's rule incorporates the RFG rule provisions for in-line blending at 40 CFR 80.65(f)(4). Such provisions will be applicable to RFG and CG. However, refineries presently having an in-line blending waiver will be asked to submit additional information under the auditing procedures included in approvals of in-line blending petitions already in place. We will contact individual holders of in-line blending approvals to request information on how sulfur is monitored and how streams of gasoline are distributed in the in-line blending process. If we cannot conclude that the monitoring procedures will assure compliance with sulfur standards, we will revoke the in-line blending approval for that purpose. We believe it is important to ensure that the in-line analyzer technology and the refiner's methodology and procedures are sufficient for the gasoline sulfur levels the refinery will have after this

rule is implemented, for both RFG and CG.

Several commenters stated that the proposed rule's requirement to test every batch of CG for sulfur is unnecessary during the period of early credit generation because there is no cap standard in effect during this period, even for those refiners generating credits. We agree that every-batch testing is not essential for CG until the refinery gate per-gallon cap standards go into effect. Thus, today's final rule allows composite sample testing for CG to continue during the period of early credits generation, until January 1, 2004, when a cap standard for sulfur is first imposed on gasoline.

5. Exceptions to the Every-Batch Testing Requirement

Under the RFG rule, refiners who blend butane or other blendstocks to previously certified gasoline (PCG) must determine the volume and parameter values of the blendstock, including sulfur content, by testing the gasoline before and after blending, and calculating the properties of the blendstock by subtracting the volume and parameter values of the PCG. For CG only, under certain conditions, we have allowed butane blenders to use the parameter specifications of butane as tested by the butane producer. We have allowed this alternative to every-batch testing because of the costs of testing each load of butane. We proposed a similar alternative to every-batch testing for butane blenders in the NPRM, which allows butane blenders to use the sulfur test result of their suppliers, if the butane contains no more than 30 ppm sulfur and if the butane blender undertakes a quality assurance program of periodic sampling and testing to ensure that the supplier's sampling and testing is accurate.

We also proposed to allow refiners that blend other blendstocks into PCG to meet an alternative testing requirement in lieu of testing every batch of gasoline. Provided that the refiner's test result for the sulfur content of each of the blendstocks is less than the national refinery level per-gallon cap standard, a refiner can sample and test each blendstock when received at the refinery, and treat each blendstock receipt as a separate batch for purposes of compliance calculations for the annual average sulfur standard.

Today's rule adopts these provisions. Several commenters urged us to delay the 30 ppm per-gallon cap standard until other refiners must meet a 30 ppm average standard. The proposed 30 ppm per gallon standard was intended to be environmentally neutral in relation to

¹⁴⁵ Except for certain truck importers, as noted above.

¹⁴⁶ As noted above, we are not requiring every batch testing for CG parameters other than sulfur.

the standard applicable to other refiners. Therefore, today's final rule makes clear that for the alternative compliance approach for butane blenders, the 30 ppm per-gallon cap is not applicable until January 1, 2005. The per-gallon cap starting January 1, 2004 is 120 ppm.¹⁴⁷ For GPA gasoline the per-gallon cap under this alternative compliance option is 150 ppm in 2004 through 2006.

6. Sampling Methods

Sampling methods apply to all parties who conduct sampling and testing under the rule. We proposed to require the use of sampling methods that were proposed in the July 11, 1997 **Federal Register** notice for the RFG/CG rule (62 FR 37338, at 37341–37342, 37375–37376). These sampling methods include ASTM D 4057–95 (manual sampling), ASTM D 4177–95 (automatic sampling from pipelines/in-line blending), and ASTM D 5842 (this sampling method is primarily concerned with sampling where gasoline volatility is going to be tested, but it would also be an appropriate sampling method to use when testing for sulfur). There were no adverse comments to the proposed sampling provisions. Today's rule adopts the methods as proposed.

7. Gasoline Sample Retention Requirements

In the NPRM, we proposed a refiner and importer (collectively referred to in this section as “refiner”) sampling and testing program to establish the sulfur compliance of each batch of gasoline produced or imported. We were aware that there were possible drawbacks to a self-testing scheme. For example, a party might sample or test gasoline in a manner that is inconsistent with the required procedures, or employees might inaccurately record the test results by mistake or otherwise. Parties might also attempt to conceal a discovered violation or to save money by not correcting a violation.

To address our concerns about self-testing, we considered an alternative option of requiring independent sampling and testing for all gasoline, including conventional gasoline. We did not propose this requirement for independent sampling and testing for all gasoline because of the costs of such a requirement,¹⁴⁸ and we are not adopting such a program in today's final rule. Instead, we proposed in the NPRM a

different strategy to complement the self-testing program that would help ensure refinery sulfur compliance. This strategy would have required refiners to retain for thirty days a representative sample from each batch of gasoline produced, and to provide such samples to the Agency upon request. We believed that, by means of this option, EPA could verify the refiner test results. We believe that this would create an incentive for refiners to sample, test, and record their sulfur results in an accurate and truthful manner. We also proposed that refiners be required to certify annually that the samples have been collected in the manner required under the sulfur rule. In addition, we proposed that specific procedures be followed by refiners to properly collect, retain, and ship the samples in a manner consistent with requirements already imposed or proposed under the RFG program. Under the proposal, a minimum representative sample of 330 ml of each gasoline batch would need to be retained (and submitted to EPA upon request).¹⁴⁹

Although there were few comments on this proposal, one commenter, the National Petrochemical & Refiners Association (“NPRA”), did comment extensively on it, and strongly urged the Agency not to finalize it. One of the points raised by the NPRA was that the RFG regulations have their own sample retention and submission requirements, (40 CFR 80.65), so that a sulfur rule provision for RFG batches was not necessary. The Agency continues to believe that sample and retention requirements are useful to ensure compliance with the sulfur standards, but we agree with NPRA that the sample retention and submission requirements found in the RFG rule will serve equally as well for the sulfur rule. Therefore, the final sulfur rule requires all refiners, including those producing RFG, to comply with the sulfur rule's retention requirements. However, any refiner of RFG using an independent laboratory pursuant to 40 CFR 80.65(f), either under the 100% Option or the 10% Option, will be considered to be in compliance with the sulfur rule's retain requirements provided the refiner ensures that the independent laboratory conducting the retain program for the refiner, is in compliance with these requirements. In particular, the refiner must ensure that its independent laboratory sends the appropriate

certificate of analysis along with any sample forwarded to EPA. Under the RFG program's 100% Option, the refiner must ensure that its independent laboratory sends the independent lab's certificate of analysis; and under the 10% Option, the refiner must ensure that its independent laboratory sends the refiner's certificate of analysis.

In addition to urging EPA not to finalize the sample retention and submission requirements for RFG gasoline, NPRA urged us not to finalize these requirements for CG as well. NPRA argued that these requirements would not prove useful in deterring non-compliance with the sulfur requirements for this product, primarily because false samples could be forwarded to EPA. The Agency disagrees with NPRA's argument. First, the goal of these requirements is not only to deter cheating but also to reveal inadequacies that exist in refiners' sulfur testing procedures. We do not expect that most non-compliance with the sulfur standards will occur through cheating, but rather through operational problems. Agency enforcement experience under the RFG rule reveals that some refiners' testing procedures are not always accurate in measuring parameters and thus detecting noncompliance. EPA verification testing will expose such testing inaccuracy, enabling the refiner to improve its testing procedures and thus improve its ability to detect, and correct, its own compliance problems. To ensure the effectiveness of these sulfur sample retention and submission requirements, the final rule requires all refiners to provide EPA with the sulfur test result the refiner has obtained for the sample, along with each sample the refiner provides to the Agency under this rule.

EPA will use these retained samples in compliance determinations. Gasoline samples that are forwarded to EPA under the sample retention requirements that are found to be in violation of a refinery cap, will be considered by EPA to be evidence of violations of the cap standard, regardless of the refiner's own test result. In addition, EPA testing of these samples may establish that the refiners' test results are generally incorrect, *i.e.*, are biased. EPA will evaluate whether such a bias constitutes evidence of a violation of the sulfur average standards applicable to the refiner, including whether the bias extends to other sulfur tests conducted by the refiner during the current or previous averaging periods. Further, evidence of testing bias could constitute evidence a refiner has not met the requirement to conduct sulfur testing in accordance with specified

¹⁴⁷ See Table IV.C.–1.

¹⁴⁸ See the discussion on this subject in the preamble to the reformulated gasoline program's final rule, 59 FR 7765 (Feb. 16, 1994).

¹⁴⁹ See 40 CFR 80.65(f)(3)(F)(ii), and the Proposed Rule for Modifications to Standards and Requirements for Reformulated and Conventional Gasoline, 62 FR 37337 *et seq.*, proposed 40 CFR 80.101(i)(1)(i)(C)(iii).

procedures, and any reports submitted to EPA that reflect the bias could be evidence a refiner has not met the requirement to properly report the sulfur content of gasoline produced.

While it is true that a party can submit false samples to EPA in order to prevent the Agency from discovering what in actuality is a non-compliant batch of gasoline, we do not believe that there will be many examples of such flagrant cheating. Our enforcement experience indicates that the great majority of parties regulated under the fuels programs work to comply with the regulatory requirements. We believe that the potential penalties for the submission of false samples to the government, and the potential criminal liability which such conduct would subject parties to under to section 113 of the Clean Air Act, will act as significant deterrents to this cheating. Last, to further decrease perceived incentives for such cheating, the regulation specifically requires that the refinery official signing and submitting the refinery's annual sulfur report must make inquiries to verify the correctness of the sampling collection and retention procedures and include with the annual sulfur report a personal certification of the correctness of the procedures used to collect the retained samples. If such certification cannot be made, then the report cannot be timely filed.

NPRA further commented that CG being counted to create early credits under the sulfur rule's ABT program should not be subject to the proposed sample retention and submission requirements. NPRA argues that the lack of a sulfur cap during the early credit timeframe makes such retention and submission unnecessary. The Agency disagrees. During the early credit generation timeframe, refiners participating in the credit program must comply with sulfur averaging requirements, even though sulfur caps are not required to be met. Accurate determination of compliance with the averaging requirements necessitates accurate sulfur testing in the early credit period, just as it does during implementation of the full sulfur program, even though sulfur testing of CG composite samples will be permitted. Hence, the sample retention and submission requirements, whose purpose is to ensure accurate testing and compliance determination, continue to be necessary for the early credit period. The final rule retains the sample retention requirements for CG during the early credit time frame.

NPRA also suggested that in place of the proposed 30 day sample retention requirement, EPA instead should

require refiners to maintain samples only from the last three batches of gasoline produced. NPRA argued that this alternative requirement would prove more economical for the refiners, yet would still provide EPA with the ability to test some samples itself. Although the Agency believes that the proposed 30 day retention period would provide a valuable amount of samples to be retained and thus available for testing by EPA, the Agency agrees that a more limited sample retention requirement could provide an acceptable means of confirming refiner testing accuracy and sulfur compliance, while being less burdensome to refiners. We do not believe, however, that retention of samples from only three batches of gasoline would be effective in accomplishing the goal of producing greater testing accuracy. Three samples would not be a great enough number to realistically demonstrate if a pattern of testing irregularities exists or to demonstrate that a significant volume of the refiner's production is covered by the testing verification process. Consequently, instead of the three batch sample retention requirement proposed by this commenter, the Agency has instead required in the final rule that at least the last 20 samples be retained, and that each sample be retained for a minimum of 21 days. The Agency believes this amended requirement addresses NPRA's concern that the amount of days of sample retention be reduced from thirty days, while also providing the Agency with an effective means of assuring a reasonable number of samples, representing a significant period of refining activity, will be available for accuracy testing. We believe the retention requirement is not burdensome given the limited number of samples that must be retained. Further, many refineries already retain samples.

A final comment by NPRA about the sample retention and submission requirements is addressed in the final rule. NPRA raised a concern about the required retention and submission of samples of pressurized blendstock, particularly butane, which would require the use of specialized high-pressure containers. The Agency agrees that there is legitimate concern about the handling, storing and shipping of such samples. We also believe that the final rule's quality assurance testing requirements and the testing requirements for blendstock suppliers provides adequate assurance of the compliance of these blendstocks. Hence, the final sulfur rule does not contain a

requirement that samples of pressurized blendstock must be retained.

E. Federal Enforcement Provisions for California Gasoline and for Use of California Test Methods To Determine Compliance

Requirements to Segregate Gasoline and to Use Product Transfer Documents for Certain California gasoline; Definition of California Gasoline

In the NPRM, the Agency proposed to generally exempt from the requirements of the federal sulfur rule certain gasoline sold or intended for sale in California. For the purpose of program consistency, the gasoline to be exempt in the sulfur rule would meet the same definition of California gasoline as found in the RFG rule (40 CFR 80.81(a)(2)). The exempt gasoline would include all gasoline sold, intended for sale, or made available for sale in California that was also either: produced within California; imported into California from outside the U.S.; or imported into California from another state, provided that the out-of-state refinery did not also produce federal RFG.

Although the NPRM proposed to exempt California gasoline from compliance with the proposed sulfur standards (for reasons discussed elsewhere in this preamble), we did propose two requirements that would apply to some exempt California gasoline. The first would require exempt gasoline produced outside of California but intended for use in California, to be segregated from non-exempt gasoline at all points in the distribution system. The second would require out-of-state producers of exempt gasoline intended for sale in California to create PTDs identifying the product as California gasoline, and would require such PTDs to be provided to all transferees of this gasoline in the distribution system. Requiring such documentation is intended to facilitate enforcement and compliance by identifying gasoline that is not federally regulated. The same PTD requirements currently apply under the RFG program.¹⁵⁰

One commenter expressed a reservation about the sulfur rule's proposed segregation requirement. The commenter was concerned that the segregation requirement for exempt California gasoline might interfere with the ability of California importers to import into California, non-exempt, federal RFG gasoline that happened to comply with California Air Resources Board (ARB) sulfur requirements, but had not been kept segregated by its out-

¹⁵⁰ See 40 CFR 80.81(g).

of-state refiner from the refiner's federal RFG product. Out of a concern about potential gasoline supply problems in California, the commenter asked for assurances from the Agency that such gasoline would not be prohibited from sale in California because of the sulfur rule's segregation requirement.

The Agency agrees that it would not be beneficial to restrict the flow of complying gasoline into California. However, since the federal and the ARB sulfur control programs provide for differing calculations of standard compliance, and since the standards themselves are not always consistent between the two programs, EPA does not believe that the compliance of gasoline produced for federal purposes will necessarily assure its compliance with ARB program requirements, and vice-versa. Therefore, we believe it is necessary to require the physical segregation of the gasolines produced for the different programs in order to best ensure compliance with our uniquely determined federal sulfur standards. To ensure segregation, it is necessary that refiners and importers designate gasoline batches destined for California as California gasoline and that PTDs identify the gasoline as being for use only in California.

Further, one of the purposes of creating the California exemption in the federal sulfur rule is to ensure the exclusion of California gasoline from the refiner's compliance calculations under the federal rule. This exclusion is necessary to prevent gasoline that is produced to comply with the strict California standards from unfairly effecting the refiner's compliance with the federal requirements, thereby facilitating the production of higher sulfur gasoline for use in a federal market supplied by the refiner. EPA believes that segregation of the two gasolines is necessary because it facilitates accurate identification of the product to be included solely in the federal compliance calculations.

EPA does not believe that requiring the segregation of California gasoline from gasoline produced for the federal market should create a significant restriction in the flow of gasoline to California. The Agency believes that if a California marketer needs to acquire ARB-complying gasoline from out-of-state, the marketer should generally be able to satisfy that need by ordering a batch of California gasoline to be created for it by out-of-state producers. Under this circumstance of the creation of a unique batch of California gasoline, segregation of the gasoline will typically be assured.

In analyzing the above comment on segregation of California gasoline, the Agency realized that the sulfur rule's proposed definition of exempted California gasoline, which paralleled the definition existing in the RFG rule, was not as complete as it should be to properly address the unique needs of the sulfur program. Specifically, the exclusion from the sulfur rule's exemption of out-of-state gasoline sold or intended for sale in California solely because it happens to be produced at a refinery that produces federal RFG gasoline, is not appropriate. Basing an exemption on whether or not an out-of-state refinery produces federal RFG is relevant to the RFG program, but it has no relevance to the sulfur control program. To ensure effective determination of compliance with federal sulfur standards, the final sulfur rule deletes any reference to RFG production in the rule's definition of exempt California gasoline. Hence, the example presented in the comment, in which out-of-state gasoline for sale in California could be considered non-exempt gasoline, would not arise under the expanded definition of California gasoline.

Use of California Test Methods and Off-Site Sampling Procedures for 49 State Gasoline

Under the NPRM and the final rule, refineries and importers located in California would be required to meet the federal sulfur standards and other requirements with regard to their "federal" gasoline to be used outside of California. However, we proposed that gasoline produced in California for sale outside of California could be tested for compliance under the federal sulfur rule using the methodologies approved by the ARB, provided that the producer complies with the procedures for such testing as already required under 40 CFR 80.81(h), which permits California test methods not identical to federal test methods to be used for conventional gasoline. Today's rule adopts this provision, as well as the corollary proposed provision that gasoline produced by California refiners for use out-of-state may be tested at off-site testing as already permitted pursuant to 40 CFR 80.81(h) for CG purposes. Both provisions in today's rule should alleviate duplicate testing burdens on California refiners subject to both the federal and California programs, since the test methods acceptable under these alternative provisions in today's rule are also currently used to comply with California requirements. No comments were received on these provisions.

F. Recordkeeping and Reporting Requirements

1. Product Transfer Documents

Small Refiner Gasoline Transfers

The NPRM proposed that the business practice PTDs that accompany each transfer of custody or title of gasoline that includes gasoline produced by any small refiner subject to sulfur rule individual refinery standards would be required to identify the gasoline as such, including the applicable downstream cap, as an aid to enforcing the national downstream cap. Today's rule adopts the proposed PTD requirement, with modifications regarding how the PTD requirement relates to testing, as described in section VI.C. The requirement for printing information on PTDs has been simplified in the final rule. All parties may use brief codes to identify the small refiner status of the gasoline and to identify the small refiner downstream standard it is subject to. This small refiner gasoline PTD provision is also applied to gasoline subject to individual refinery standards under the temporary refiner relief provision of today's rule.

GPA Gasoline Transfers

Under the geographic phase-in program finalized today, gasoline produced or imported for use in the GPA may be used only in the GPA states. Therefore, it is necessary for PTDs for gasoline that is comprised in whole, or in part, of GPA gasoline, to identify the gasoline as such and state that the gasoline may not be distributed or sold for use outside the GPA. Product codes may be used to provide this information, except in the case of transfers to truck carriers, retailers and wholesale purchaser-consumers.

2. Recordkeeping Requirements

Under today's rule, refiners and importers will be required to keep and make available to EPA certain records that demonstrate compliance with the sulfur program standards and requirements. This includes records pertaining to the generation, use and transfer of credits and allotments. The RFG/CG regulations currently require refiners and importers to retain records that include much of the information required in the sulfur rule. Where this is the case, there is no requirement for duplication of records or information.

Under the final rule, all parties in the gasoline distribution system, including refiners, importers, oxygenate blenders, retailers, and all types of distributors will be required to retain PTDs and records of quality assurance programs (including, where applicable, sulfur test

results) that parties conduct to establish a defense to downstream violations. All parties in the gasoline distribution system currently are required to keep PTDs for RFG. However, since there are no downstream CG standards under the anti-dumping regulations, only refiners and importers are required to retain PTDs for conventional gasoline under the current regulations. Because the sulfur rule, like the RFG rule, includes downstream standards, we believe that a requirement to retain PTDs for all parties in the gasoline distribution system is appropriate under the sulfur rule. The PTD information will help us identify the source of any gasoline found to be in violation of the sulfur standards, and will provide downstream parties with information regarding the applicable downstream standard.

Parties are required to keep records for a period of five years,¹⁵¹ with additional requirements for records pertaining to credits and allotments. Records pertaining to credits or allotments that were banked and never transferred to another party are required to be retained for five years after the credits or allotments are used for compliance purposes. Records pertaining to credits or allotments that were transferred are required to be retained by the transferor for five years after the year the credits or allotments were transferred, and by the transferee for five years after use.

We received comment that the regulations should allow records to be maintained in non-hard copy formats, such as photographic or electronic means. We do not believe that the recordkeeping requirements, as proposed, disallow the retention of records in electronic or photographic form. However, parties that electronically generate and/or maintain records must make available to EPA the hardware and software necessary to review the records, or if requested by EPA, electronic records shall be converted to paper documents.

The sulfur rule, like the RFG/CG rule, requires regulated parties to keep the results of tests conducted on the gasoline. A number of parties previously have asked EPA to clarify whether, under the RFG/CG rule, this recordkeeping requirement requires parties to keep copies of all documents that contain test results. To clarify what the recordkeeping requirements require with regard to test data, we proposed for the RFG/CG rule to add language which specifies that the test result as originally

printed by the testing apparatus is required to be kept, or, where no printed result is generated by the testing apparatus, the results as originally recorded by the person who performed the tests. Today's action incorporates this clarification in the sulfur rule. Under this provision, where the test data is initially recorded into a database system and there are no prior written recordings of the data, the information in the database system may serve as the original record of the test data. The final rule also specifies that any record that contains results for a test that are not identical to the results as originally printed by the testing apparatus or recorded by the person who performed the test must also be kept. Although this language was not included in the NPRM, we have concluded it is a logical outgrowth of the proposal regarding recordkeeping for test data, and that it will make the regulation clearer with regard to this requirement. As a result, it is appropriate to include this language in the final rule.

3. Reporting Requirements

Refiners and importers will be required to submit an annual report that demonstrates compliance with the applicable sulfur standards and data on individual batches of gasoline, including batch volume and sulfur content. The rule requires that refiners and importers report on the generation, use and transfer of credits and allotments. The RFG/CG programs contain similar reporting requirements. Based on our experience with these programs, we believe that requiring an annual sulfur report and batch information will provide an appropriate and effective means of monitoring compliance with the average standards under the sulfur program. The batch data also will serve to verify that each batch of gasoline met the applicable sulfur cap standard when it left the refinery or import facility. The batch data must also show which batches were designated as GPA gasoline, as appropriate.

For the 2004 and 2005 annual averaging periods, refiners will be required to submit a report for the refiner's gasoline production (RFG and conventional gasoline) for all refineries during the averaging period, which demonstrates compliance with the applicable corporate average and per-gallon cap standards. For the 2005 annual averaging period, refiners will also be required to submit a separate report for each refinery, which demonstrates compliance with the refinery average standard. For the 2004 and 2005 annual averaging periods,

importers will be required to submit a report for all of the gasoline they import during the averaging period, which demonstrates compliance with the applicable corporate average and per-gallon cap standards. The importer's report for 2005 must also demonstrate compliance with the refinery average (30 ppm) standard. Any refiner who is also an importer must aggregate the refining and importing activities for the purpose of demonstrating compliance with the applicable corporate average standards. Importers of gasoline produced by foreign refiners with individual baselines have additional reporting requirements. For the 2006 averaging period and beyond, corporate average reports are no longer required for either refiners or importers. Refiners will be required to submit an annual report for each refinery (importers for the gasoline they import), which demonstrates compliance with the refinery average and per-gallon cap standards. Refiners or importers producing both GPA gasoline and gasoline for the remainder of the country, must separately report compliance with the different standards. Annual reports, on forms provided by the Agency, must be received by EPA by the last day of February for the prior calendar year.

The annual reports will also provide a vehicle for accounting for any sulfur allotments or credits created, sold or used to achieve compliance during the averaging period. (See Section IV.C. for a discussion of the sulfur allotment and ABT credit programs.) Each refiner or importer choosing to participate in the ABT program will be required to report to the Agency on an annual basis (refiners for each refinery, and importers for the gasoline they import) the applicable sulfur baseline and the annual average gasoline sulfur level produced at that refinery or by that importer (in ppm sulfur) during the averaging period. Credit calculations will be reported, along with an accounting of credits banked, used, traded, acquired or terminated. The credits will be in units of ppm-gallons. The identity of the refiners/refineries and importers involved in these transactions will be reported, along with the registration numbers assigned to them by the Agency under the RFG/CG program (40 CFR 80, subparts D, E, and F).

For years 2000 through 2003, parties who generate early ABT credits will be required to report information relating to the generation of these credits. These early credit reports will only cover credits banked and traded. Beginning in 2004 and beyond, refiners and importers

¹⁵¹ Five years is the applicable statute of limitations for the RFG and other fuels programs. See 28 U.S.C. 2462.

who generate and/or use ABT credits will be required to submit information relating to the generation and use of the credits as part of their annual compliance reports, including any credit debit that is carried over to the subsequent year. For each purchase of ABT credits, as reported on the buyer's annual report, there must be a corresponding entry on the seller's annual report. The annual report must also indicate any credits that are used to achieve compliance with the refinery average standard.

As discussed above, during the 2004 and 2005 annual averaging periods, refiners for the combined production from all their refineries, and importers for the gasoline they import, will also be required to demonstrate compliance with the applicable corporate average standard. In addition, refiners and importers must demonstrate compliance with the requirements for the generation, use, transfer and termination of allotments. Refiners and importers who trade sulfur allotments to meet the corporate average standard will be required to submit information relating to these transactions. All sulfur allotment transactions must be concluded by the last day of February of the calendar year following the year the allotments were used to meet the corporate average. Information relating to such transactions, including the identity of the refiners and importers involved in the transactions and their EPA registration numbers, must be reported by both parties to the transaction as part of their annual compliance reports.

As discussed in Section IV.C., above, parties that only blend oxygenates into gasoline are not treated as refiners under the sulfur rule, and, as a result, are not subject to the reporting requirements under § 80.370.

Refiners and importers are also required to arrange for a certified public accountant or certified internal auditor to conduct an annual review of the company's records that form the basis of the annual sulfur compliance report (called an "attest engagement"). The purpose of the attest engagement is to determine whether representations by the company are supported by the company's internal records. Attest engagements are already required under the RFG/CG regulations. The refiner's attest engagement under the RFG/CG rule partially encompasses sulfur rule compliance since the attest auditors are already required to verify sulfur results for both CG and RFG. However, the RFG/CG attest engagements do not require the attest auditor to review sulfur credit generation, credit

purchases, credit trading or small refiner issues. Because of the complexity of the sulfur credit program and small refiner program, sulfur attest engagement provisions have been adopted by today's rule that require the attest auditor to review sulfur credit generation, credit trading, credit purchasing, credit selling, corporate pool averaging, and small refiner issues. Consistent with the RFG regulations, the attest reports for sulfur are to be included in the presently required attest engagement submitted by May 31 of each year.

G. Exemptions for Research, Development, and Testing

The final rule provides for an exemption from the sulfur requirements for gasoline used for research, development and testing purposes. We recognize that there may be legitimate research programs that require the use of gasoline with higher sulfur levels than those allowed under the sulfur rule. As a result, the final rule includes provisions for obtaining an exemption from the prohibitions for persons distributing, transporting, storing, selling or dispensing gasoline that exceeds the standards, where such gasoline is necessary to conduct a research, development or testing program. Parties are required to submit to EPA an application for exemption that describes the purpose and scope of the program and the reasons why use of the higher sulfur gasoline is necessary. In approving any application, EPA will impose reasonable conditions such as recordkeeping, reporting, volume limitations and possible requirements to repair vehicles.

We received comment that the regulations should clarify that suppliers of gasoline used for R&D purposes are exempt from the prohibitions and penalties under the sulfur rule. To clarify this point, we have added a provision which explicitly states that gasoline subject to an R&D exemption is exempt from the provisions of subpart H, so long as the gasoline is used in a way that complies with the terms of the memorandum of exemption. If the R&D exemption is shown to be based on false information or is not properly maintained, parties will be liable for violations of the provisions under subpart H regarding any gasoline covered under the exemption.

We also received comment that the regulations should ensure that vehicles which have been used for testing with high sulfur test fuels are not later returned to the general fleet, or if they are, the vehicles should be required to be restored to their original condition.

EPA agrees that it would be improper to permit such vehicles to be used in general use if their emission controls have been rendered inoperative through fueling with high sulfur gasoline. This issue may be effectively addressed through the anti-tampering requirements of section 203(a)(3) of the Clean Air Act, 42 U.S.C. § 7522(a)(3), and is also addressed in today's rule, which provides the Administrator with the power to include appropriate conditions when granting R&D exemptions.

H. Liability and Penalty Provisions for Noncompliance

The liability and penalty provisions under the sulfur rule are similar to the liability and penalty provisions of the RFG and other fuels regulations.¹⁵² Regulated parties will be liable for committing certain prohibited acts, such as selling or distributing gasoline that does not meet the sulfur standards, or causing others to commit prohibited acts. In addition, parties will be liable for a failure to meet certain affirmative requirements, such as the recordkeeping or PTD requirements, or causing others to fail to meet such requirements.

The sulfur rule, like other EPA fuels regulations, includes a presumptive liability scheme for violations of prohibited acts. Under this approach, the party in the gasoline distribution system that controls the facility where the violation occurred, and other parties in that gasoline's distribution system (such as the refiner, reseller, and distributor), are presumed liable for the violation.¹⁵³ The sulfur rule explicitly includes causing another person to commit a prohibited act and causing the presence of non-conforming gasoline to be in the distribution system as prohibitions. The final rule clarifies that causing the presence of non-conforming gasoline to be in the distribution system includes gasoline that does not conform to the applicable average standard, as well as gasoline that does not conform to the cap standard. Affirmative defenses are provided for each party that is deemed presumptively liable for a violation, and all presumptions of liability are refutable. The defenses under the sulfur rule are similar to those

¹⁵² See section 80.5 (penalties for fuels violations); section 80.23 (liability for lead violations); section 80.28 (liability for volatility violations); section 80.30 (liability for diesel violations); section 80.79 (liability for violation of RFG prohibited acts); section 80.80 (penalties for RFG/CG violations).

¹⁵³ An additional type of liability, vicarious liability, is also imposed on branded refiners under these fuels programs.

available to parties for violations of the RFG regulations.

The final sulfur rule, like the proposal, applies the provisions of section 211(d)(1) of the Clean Air Act (Act) for the collection of penalties. The penalty provisions subject any person who violates any requirement or prohibition of the sulfur rule to a civil penalty of up to \$27,500 for every day of each such violation and the amount of economic benefit or savings resulting from the violation. A violation of the applicable average sulfur standard constitutes a separate day of violation for each day in the averaging period. A violation of a sulfur cap standard constitutes a separate day of violation for each day the gasoline giving rise to the violation remained in the gasoline distribution system. The length of time the gasoline in question remained in the distribution system is deemed to be twenty-five days unless there is evidence that the gasoline remained in the gasoline distribution system for fewer than or more than twenty-five days. The penalty provisions are similar to the penalty provisions for violations of the RFG regulations.

After consideration of the comments received, the Agency is adopting regulations that specify the regulated parties who may be subject to liability for causing a violation of the sulfur rule. As proposed, the regulation would have applied to any person, not limited to the parties in the gasoline distribution system whose actions could logically have caused the nonconformity. This provision would have potentially broadened the range of liable parties under the sulfur rule beyond the range established under other fuel programs. EPA believes that the presumptive liability schemes of current fuels regulations have generally been effective and finds no compelling reason to apply the regulatory provision at issue to "any person" rather than to specific parties. Therefore, in the final sulfur rule, the liability sections for the causation violations will specify the regulated parties subject to the liability, and will not encompass unspecified parties. The final rule clarifies that oxygenate blenders are among the specified parties potentially subject to liability. Today's final rule also clarifies that parent corporations are liable for violations of subsidiaries. This is consistent with our interpretation of the RFG rule, as stated in the RFG and Anti-dumping Question and Answer document. Finally, the final rule clarifies that each partner to a joint venture will be jointly and severally liable for the violations at a joint venture facility or by a joint venture operation.

We received several comments on the proposal. Some commenters believe that the Act does not authorize EPA to establish prohibitions against causing another person to commit a prohibited act or causing the presence of non-conforming gasoline to be in the distribution system. These commenters believe that these prohibitions are a departure from the liability scheme under the existing fuels regulations and that they constitute double jeopardy by imposing liability for multiple violations for a single act. The commenters also believe that imposing liability for causing another person to commit a prohibited act extends the limits that Congress placed on liability under section 211 of the Act, since sections 211(d) and 211(k)(5) do not expressly mention imposing liability for causing another person to violate regulations. The commenter also noted that, had Congress intended for such actions to be prohibited, it could have expressly included such a prohibition in section 211. This commenter cites section 211(g) as an example of a statutory provision with such a prohibition. One commenter said that, rather than clarify the presumptive liability scheme, the rule provides no guidance regarding what it means to cause someone to violate a prohibition or cause non-conforming gasoline to be in the distribution system. A commenter also stated that these proposed prohibitions are unnecessary, since EPA has issued violations to multiple parties under current fuels regulations.

EPA disagrees with the comment that the sulfur rule's proposed liability scheme is a marked departure from the liability schemes typically found in the other fuels programs promulgated pursuant to section 211 of the Act and with the comment that the regulations constitute double jeopardy (the double jeopardy issue is addressed in the Response to Comment document). The majority of these programs, including the proposed sulfur rule, contain presumptive liability enforcement structures which impose liability on parties who, through their actions, could logically have caused the fuel nonconformity. The sulfur rule's presumptive liability scheme is thus consistent with the liability schemes of typical prior fuels programs. While EPA has issued notices of violations to multiple parties for violations under current fuels regulations, the Agency believes it is appropriate to clarify that the act of causing another party to violate the regulations is a prohibited act. Therefore, the regulatory language

in the sulfur regulations explicitly addresses this issue.

EPA also disagrees with the comment that this provision is inconsistent with Section 211(d) of the Act because Section 211(d) does not mention imposing liability for causing another person to violate the regulations promulgated under Section 211(c). For the reasons described above, EPA is adopting a provision in today's regulations that prohibits causing another entity to violate the standards. This prohibition is a reasonable exercise of EPA's discretion under Section 211(c), and the penalty provision of Section 211(d) apply to violations of the prohibition. The fact that Section 211(d) does not specifically mention causing another person to violate the regulations is therefore irrelevant, such action is itself a violation of the regulations. Moreover, Section 211(d) does not mention any specific violations for which penalties may be assessed, but rather states generally that violations shall result in penalties. Thus, the absence of specific mention of causing another entity to violate the regulations is irrelevant, since all other specific prohibitions in regulations subject to Section 211(d) penalties are similarly not mentioned.

The Agency also disagrees with the comment that the Clean Air Act does not give EPA the authority to establish causation violations under the sulfur rule. We believe that the Act gives us ample authority to categorize the sulfur rule's causative acts, *i.e.*, the causing of another party to commit a violation, and the causing of nonconforming gasoline to be present in the distribution system, as prohibited acts. Section 211(c) of the Act authorizes the Agency to promulgate regulations for the purpose of prohibiting or controlling the manufacture, introduction into commerce, sale, or offering for sale of fuels or fuel additives where the fuel or additive causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare, or where the fuel or additive will impair to a significant degree the performance of emission control devices that are or will be in general use. Today's gasoline sulfur rule is promulgated pursuant to this authority.

Section 211(c) gives EPA broad discretion to fashion regulations to control or prohibit the manufacture, introduction into commerce, sale, or offering for sale of fuels once the Agency has made the requisite findings regarding contribution to harmful air pollution or impairment of vehicle emissions control system performance. This includes the discretion to adopt

reasonable regulatory provisions that are necessary and appropriate to ensure that the controls or prohibitions are effective. To effectively regulate sulfur in gasoline under section 211, it is necessary for the Agency to regulate the actions of those parties who do the manufacturing, introducing into commerce, and selling of gasoline subject to the sulfur requirements.

When one or several of these regulated parties causes another regulated party to violate the rule (or causes nonconforming gasoline to be present in the system), such an act could logically result in the high sulfur gasoline contributing to harmful air pollution or to the impairment of vehicle emission control device performance, which are the adverse impacts that legislative authority under section 211(c) was created to control. Examples of such upstream causative acts include the scenario where a refiner produces high sulfur gasoline which it sells to a distributor. That distributor then resells the nonconforming product to a variety of retail outlets which, in their turn, also violate the rule by selling the high sulfur gasoline to owners of motor vehicles. Another example occurs where a distributor has created high sulfur gasoline by blending high sulfur blendstock into his gasoline. This distributor then makes several different sales of this noncomplying product to a variety of retail outlets, which, in their turn, also violate the rule by selling the product to numerous motor vehicle owners. A third upstream causation scenario could occur if several refiners happen to make nonconforming gasoline. Each then sells its nonconforming product to a different distributor, and a retail outlet which is a customer of both distributors, purchases some of the noncomplying gasoline from both distributors. The retailer then commits a violation by offering this product for sale to its customers.

In some cases, an upstream action has more severe environmental impacts through causing a downstream violation than would occur if the violation was corrected upstream. For example, a refiner may violate the sulfur regulations by shipping gasoline that exceeds the applicable standards when it leaves the refinery. If that violation is corrected before the gasoline reaches the retail outlets, the adverse environmental impacts could be mitigated or avoided. However, if the refiner's violation is not corrected and ultimately causes a number of violations of the standards at retail outlets, the environmental impact would be more severe, since high sulfur gasoline would be introduced into

vehicles and impair catalyst performance. Therefore, it is reasonable to consider causing a downstream violation by another party to be a separate violation, since an upstream party's actions can have more severe environmental consequences if they cause downstream parties to violate applicable requirements. For these reasons, it is reasonable to conclude that section 211(c) authorizes the Agency to prohibit and control such causative acts in order to ensure that gasoline ultimately introduced into vehicles meets the low sulfur standards.

Our approach is also reasonable under section 211(c) even though section 211(c) does not expressly prohibit causing another party to violate standards adopted under this subsection. In fact, section 211(c) itself does not contain any express prohibitions, but rather provides EPA authority to regulate fuels and fuel additives, based on certain findings. In contrast, other provisions of section 211, such as section 211(g), do include express prohibitions against certain actions. Thus, under section 211(g), the specified actions are prohibited even in the absence of EPA adopting regulations to codify the prohibitions. In section 211(g), Congress indicated a clear intent to prohibit a specific action (misfueling), without requiring EPA to adopt regulations to implement that prohibition. However, section 211(c) authorizes EPA to establish regulations with certain controls and prohibitions, and, as described above, EPA has the discretion to adopt reasonable measures to ensure that the requirements of such regulations are met.

Moreover, the commenters' assertion that this provision is inconsistent with other subsections of section 211 of the Act is misplaced. First, while the sulfur standards do apply to all gasoline, including gasoline subject to the reformulated gasoline requirements, the sulfur standards are being adopted pursuant to EPA's authority under section 211(c)(1), not under section 211(k). Therefore, section 211(k)(5)'s prohibitions, which describe actions that are violations of section 211(k), are not relevant to the sulfur standards. In addition, the enumeration of specific prohibitions in section 211(k) does not mean that EPA may establish no other prohibited acts with respect to reformulated gasoline; rather, it simply identifies certain actions that "shall be" violations of section 211(k), but does not preclude establishment of other appropriate prohibited acts pursuant to EPA's authority under the Act.

The Agency also disagrees with the argument that the proposed causation

violations under the sulfur rule would impose unjustifiable, multiple liability for the commission of a single prohibited act. The Agency is generally not in the best position to know the exact cause of a gasoline nonconformity since so many parties and actions are involved with the sale and transfer of the gasoline. Therefore, for effective enforcement, we must have the ability to assert the liability of all the parties in the system who were connected with the nonconforming gasoline because they each could have caused the violation. Similarly, we must also have the ability to assert upstream liability for the full number of downstream violations a party may be responsible for causing, even if the multiple downstream violations may all ultimately be found to stem from one gasoline sale or transfer on the part of the upstream party. The enforcement possibility exists that the separate downstream violations may each have stemmed from separate actions by that party.

Any party may rebut the presumption of liability for each asserted violation by establishing through affirmative defenses that it did not cause the violation. Moreover, any party against whom EPA institutes an enforcement action may raise equitable factors about its own conduct as part of settlement of the violation enforcement action. In settling fuels matters, the Agency typically takes into account such matters as the volume of nonconforming product that a party was connected with, and the severity and the amount of proscribed activity that the party was actually involved with in causing the violation. We do not believe that either the sulfur rule's liability scheme or its future implementation will be arbitrary or unjustified.

To further alleviate commenters' concern about potential liability for multiple violations under the sulfur rule, we want to clarify that the Agency does not ordinarily attempt to collect separate penalties from an entity for the array of possible standard violations (e.g., both for the manufacturing and the selling of noncomplying product), that a party might be liable for in respect to the same gasoline. In addition, we do not intend to seek penalties from a single party for violating regulatory standard requirements while also seeking penalties for that party's causing of other entities to violate regulatory standard requirements, where both violations involve the same gasoline, unless very unusual circumstances exist which would warrant such action, such as egregious conduct on the part of the party.

In a similar fashion, we do not expect to collect penalties from one party for both types of causation violations for the same amount of gasoline under normal circumstances. A primary Agency purpose in defining the causation violations as two separate prohibited acts (*i.e.*, causing another to commit a violation, and causing the presence of nonconforming product in the distribution system), was not to collect a double penalty, but to address different scenarios of evidence collection. For example, if the Agency finds a sulfur rule standard violation in a sample from a retail outlet supplied by a certain distributor, but we do not have a nonconforming sample from the distributor, the evidence would most easily permit us to assert that the distributor was responsible for causing the retailer violation that we do have evidence for. It is reasonable for us to assert the causation violation against the distributor in spite of our lack of a sample from the distributor, because any distributor who transfers gasoline to a retailer, which gasoline is found to be noncompliant, could logically have caused the noncompliance of the gasoline when it was under the distributor's control, such as by blending high sulfur blendstock into the gasoline.

On the other hand, if we have a violation sample from a distributor, but no samples from its downstream customers, we may assert that the distributor caused the presence of nonconforming gasoline in the distribution system, rather than assert that the distributor caused another party to sell nonconforming product, since we don't have a nonconforming sample from another party's facility. It would be reasonable for us to assert that the distributor caused the presence of nonconforming gasoline in the distribution system since we do have a sample of nonconforming gasoline from the distributor, and provided also that there is evidence that the distributor had sold, transferred, etc. this product to downstream customers.

In summary, the Agency intends to enforce the liability scheme of the sulfur rule in the same reasonable manner that we have enforced the similar liability schemes in our prior fuels regulations. This does not include attempting to penalize a party for multiple variations of noncompliance in regard to the same gasoline unless unusual circumstances make such action appropriate.

1. How Will Compliance With the Sulfur Standards Be Determined?

We have often used a variety of evidence to establish non-compliance

with the requirements imposed under our current fuels regulations. Test results of the content of gasoline have been used to establish violations, both in situations where the sample has been taken from the facility at which the violation occurred, and where the sample has been obtained from other parties' facilities when such test results have had probative value of the gasoline's characteristics at points upstream or downstream. The Agency has also commonly used documentary evidence to establish non-compliance or a party's liability for non-compliance. Typical documentary evidence has included PTDs identifying the gasoline as inappropriate for the facility it is being delivered to, or identifying parties having connection with the non-complying gasoline.

EPA proposed that compliance with the sulfur standards would be determined based on the sulfur level of the gasoline, as measured using the regulatory testing methodologies. We further proposed that any evidence from any source or location could be used to establish the gasoline sulfur level, provided that such evidence is relevant to whether the level would have been in compliance if the regulatory sampling and testing methodology had been correctly performed. In today's action, EPA is adopting the proposed regulatory provision.

Several commenters interpreted this proposed language as evidencing the Agency's intent to make all evidence, including evidence not derived from regulatory test methods, equal in probative value to that from the regulatory test methods. One commenter also stated that the proposed provision is inconsistent with other parts of the proposal because it undercuts the benefits of having clearly defined regulatory test methodologies. EPA disagrees that the regulatory language indicates such an intent, or has such an effect. The regulations provide that compliance with the standards is to be determined using specified test methodologies. While other information may be used, including test results using different test methods, such other information may only be used if it is relevant to determining whether the sulfur level would meet applicable standards had compliance been properly measured using the specified test methodologies. Thus, the regulation adopted today does not result in a situation where any and all evidence carries equal weight in an enforcement action. In fact, the regulation establishes the regulatory test method as the standard against which other evidence is measured. Moreover, since any

evidence other than regulatory test results must be relevant to compliance using the test method, EPA disagrees with the commenter who stated that the validity of the sulfur standards can be challenged in any enforcement action because neither EPA nor regulated entities will be able to rely on measurements taken using the regulatory test methods. Rather than causing more confusion regarding compliance with the standard, this provision clarifies that the regulatory test method defines compliance, since other evidence can only be used if it relates to compliance using that test method.

The following is an example of how the Agency believes evidence of standard non-compliance not based on regulatory test results might be used for compliance purposes under today's rule provisions. Under a first scenario, the Agency might not have sulfur results derived from regulatory test methods for a certain amount of gasoline sold by a terminal, yet the terminal's own test results, based on testing using methods other than those specified in the regulations, show an exceedance of the sulfur standard. Under the requirements of today's rule, the evidence from the non-regulatory test method could only be used to establish noncompliance if the terminal's test results are relevant to the determination of the gasoline's sulfur level that would have resulted if the regulatory test method had been used. Thus, the Agency would have to present evidence to link the results of the alternative test method to sulfur levels as measured using the regulatory test method.

Another commenter has suggested that, if the Agency decides to finalize a "credible evidence" provision, it use the language in the current RFG regulations which establishes a presumption that the regulatory testing methods prevail, except in exceptional circumstances. Other commenters also opposed the proposed provision in part because it differs from that in EPA's current fuels regulations. As described above, EPA believes that the provision adopted today does not undercut the importance of the regulatory testing methodologies, since other evidence may be used only as relevant to compliance as measured using the regulatory methods. In addition, as is consistent with the RFG scheme, EPA believes it is appropriate to use such other evidence even in some circumstances where test results using the regulatory test methods do exist, and the provision adopted today clarifies this. EPA also notes that it intends to undertake rulemaking in the near future to revise the current fuels regulations to

include the same language for use of other evidence as adopted today in the final sulfur rule.

The provision adopted today also clarifies that any probative evidence obtained from any source or location may be used to establish non-compliance with requirements other than the sulfur standards, such as recordkeeping requirements and requirements to properly calculate sulfur credits and averages, as well as to establish which parties have facility control or some other basis for liability for sulfur rule non-compliance. Since proof of these elements is not predicated on establishing sulfur levels, whether or not regulatory test methods are used is not significant. Therefore commenters' concern about the use of other evidence undercutting the primacy of the regulatory test methods is not germane to this part of the regulation which is not directed toward standards. This provision is being included in the final sulfur rule to clarify that this rule, as is consistent with our interpretation of our other fuels rules, contemplates the full use of all relevant evidence to establish non-standard violations and rule liability.

EPA disagrees with the commenters who stated that EPA lacks authority under the Clean Air Act to permit the use of any evidence of non-compliance of the sulfur standards other than test results using the regulatory test methods. One commenter notes that the only explicit reference in the Act to the use of "credible evidence" is in section 113(e), which applies only to stationary sources, and that neither section 211 nor section 205 mention "credible evidence." Finally, the commenter states that the proposed provision is inconsistent with the directive of section 211(k) that EPA determine appropriate measures of and methods for ascertaining the emissions of air pollutants.

EPA disagrees with the comments asserting that the Agency lacks authority to promulgate this provision. While section 113(e) does refer to "credible evidence," that provision is not relevant to EPA's action today. Moreover, the absence of the explicit use of the term "credible evidence" in sections 205 and 211 does not compel a conclusion that EPA lacks authority to allow the consideration of relevant evidence in determining compliance with the sulfur standards. EPA believes that section 211(c) provides sufficient authority to adopt such a provision. Section 211(c) authorizes the Agency to promulgate regulations for the purpose of prohibiting or controlling the manufacture, introduction into

commerce, sale, or offering for sale of fuels or fuel additives where the fuel or additive causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare, or where the fuel or additive will impair to a significant degree the performance of emission control devices that are or will be in general use. As described in other sections of this preamble and in the RIA, today's regulation is promulgated pursuant to this authority. Section 211(c) gives EPA broad discretion to fashion regulations to control or prohibit the manufacture, introduction into commerce, sale, or offering for sale of fuels once the Agency has made the requisite findings regarding contribution to harmful air pollution or impairment of vehicle emissions control system performance. This includes the discretion to adopt reasonable regulatory provisions that are necessary and appropriate to ensure that the controls or prohibitions are effective and can be enforced.

To ensure the effectiveness and the ability to adequately enforce the sulfur standards, it is reasonable for EPA to consider evidence other than actual test results using the regulatory test method, where such evidence can be related to the test results. As described above, test results using the regulatory test method are often not available. In such circumstances, it is reasonable to consider other evidence of compliance, such as test results using other methods or commercial documents, if such evidence can be shown to be relevant to determining whether the gasoline would meet the standard if tested using the regulatory methods. This provision would not permit the use of other evidence that is not relevant to such a determination, and is therefore reasonably limited to allow for effective enforcement, without creating uncertainty about compliance.

Finally, EPA disagrees with the commenter's assertion that this provision is inconsistent with section 211(k). First, while the sulfur standards do apply to all gasoline, including gasoline subject to the reformulated gasoline requirements, the sulfur standards are being adopted pursuant to EPA's authority under section 211(c)(1), not under section 211(k). In any case, the directive of section 211(k)(4) that EPA determine through regulation appropriate measures of and methods for ascertaining the emissions of air pollutants explicitly applies only for purposes of section 211(k), and applies for determining the emissions levels of VOCs and toxic air pollutants from baseline vehicles when operating on baseline gasoline, as defined by section

211(k). Thus, the commenter's reference to section 211(k)(4) as inconsistent with the provision adopted today is misplaced, particularly in light of the limited applicability of the language in section 211(k)(4).¹⁵⁴

As described in the NPRM, the Agency frequently uses a variety of evidence to establish compliance with fuel programs' regulatory requirements and liability for non-compliance. Such evidence has included test results obtained from a variety of sources, including bills of lading, delivery records, manifests, and other commercial documents. The compliance determination provisions included in today's final rule are created to provide the most effective Agency capability to enforce the rule's requirements.

VII. Public Participation

A wide variety of interested parties participated in the rulemaking process that culminates with this final rule. The formal comment period and four public hearings associated with the NPRM provided additional opportunities for public input. EPA also met with a variety of stakeholders, including environmental and public health organizations, oil company representatives, auto company representatives, emission control equipment manufacturers, and states at various points in the process.

We have prepared a detailed Response to Comments document that describes the comments received on the NPRM and presents our response to each of these comments. The Response to Comments document is available in the docket for this rule and on the Office of Mobile Sources internet home page. Comments and our responses are also included throughout this preamble for several key issues.

VIII. Administrative Requirements

A. Administrative Designation and Regulatory Analysis

Under Executive Order 12866 (58 FR 51735, Oct. 4, 1993), the Agency is required to determine whether this regulatory action would be "significant" and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The order defines a "significant regulatory action" as any regulatory action that is likely to result in a rule that may:

¹⁵⁴ The commenter references section 211(k)(5) as support for its assertion, but quotes language from section 211(k)(4). EPA assumes that the commenter intended to cite section 211(k)(4) rather than section 211(k)(5).

- Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or,

- Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, EPA has determined that this final rule is a "significant regulatory action" because the vehicle standards, gasoline sulfur standards, and other regulatory provisions, if implemented, would have an annual effect on the economy in excess of \$100 million. Accordingly, we have prepared a Final Regulatory Impact Analysis (RIA) which is available in the docket for this rulemaking and at the internet address listed under **ADDRESSES** above. This action was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12866. Any written comments from

OMB on today's action and any responses from EPA to OMB comments are in the public docket for this rulemaking.

B. Regulatory Flexibility

The Regulatory Flexibility Act, 5 U.S.C. 601–612, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, to ensure that concerns regarding small entities are adequately considered during the development of new regulations that affect them. EPA has identified industries subject to this rule and has provided information to, and received comment from, small entities and representatives of small entities in these industries. We have prepared a Final Regulatory Flexibility Analysis (RFA) to evaluate the economic impacts of today's proposal on small entities.¹⁵⁵ The key elements of the RFA include:

- The number of affected small entities;
- The projected reporting, record keeping, and other compliance requirements of the proposed rule, including the classes of small entities that would be affected and the type of professional skills necessary for preparation of the report or record;
- Other federal rules that may duplicate, overlap, or conflict with the proposed rule; and

- Any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize significant economic impacts of the proposed rule on small entities.

The Agency convened a Small Business Advocacy Review Panel (the Panel) under section 609(b) of the Regulatory Flexibility Act as added by SBREFA. The purpose of the Panel was to collect the advice and recommendations of representatives of small entities that could be affected by today's proposed rule and to report on those comments and the Panel's findings as to issues related to the key elements of the Regulatory Flexibility Analysis under section 603 of the Regulatory Flexibility Act. The report of the Panel has been placed in the docket for this rulemaking.¹⁵⁶

The contents of today's final rule and the Final Regulatory Flexibility Analysis reflect the recommendations in the Panel's report. We summarize our outreach to small entities and our responses to the recommendations of the Panel below.

1. Potentially Affected Small Businesses

The Regulatory Flexibility Analysis identifies small businesses from the industries in the following table as subject to the provisions of today's rule:

TABLE VIII.1.—INDUSTRIES CONTAINING SMALL BUSINESSES POTENTIALLY AFFECTED BY TODAY'S RULE

Industry	NAICS ^a codes	SIC ^b codes	Defined by SBA as a small business if: ^c
Motor Vehicle Manufacturers	336111 336112 336120	3711	< 1000 employees.
Alternative Fuel Vehicle Converters	336311 541690 336312 422720 454312 811198 541514	3592 8931 3714 5172 5984 7549 8742	< 500 employees. < 750 employees. < 100 employees. < \$5 million annual sales.
Independent Commercial Importers of Vehicles and Vehicle Components.	811112 811198 541514	7533 7549 8742	< \$5 million annual sales.
Petroleum Refiners	324110	2911	< 1500 employees.
Petroleum Marketers and Distributors	422710 422720	5171 5172	< 100 employees.

^a North American Industry Classification System.

^b Standard Industrial Classification system.

^c According to SBA's regulations (13 CFR 121), businesses with no more than the listed number of employees or dollars in annual receipts are considered "small entities" for purposes of a regulatory flexibility analysis.

The Final RFA identifies about 15 small petroleum refiners, several hundred small petroleum marketers,

and about 15 small certifiers of covered vehicles (belonging to the other

categories in the above table) that would be subject to the rule.

¹⁵⁵ The Final RFA is contained in Chapter 8 of the Regulatory Impact Analysis.

¹⁵⁶ Report of the Small Business Advocacy Panel on Tier 2 Light-Duty Vehicle and Light-Duty Truck Emission Standards, Heavy-Duty Gasoline Engine

Standards, and Gasoline Sulfur Standards, October 1998.

2. Small Business Advocacy Review Panel and the Evaluation of Regulatory Alternatives

The Small Business Advocacy Review Panel was convened by EPA on August 27, 1998. The Panel consisted of representatives of the Small Business Administration (SBA), the Office of Management and Budget (OMB), and EPA. During the development of the proposal, EPA and the Panel were in contact with representatives from the small businesses that would be subject to the provisions of the rule. In addition to verbal comments from industry noted by the Panel at meetings and teleconferences, we received written comments from each of the affected industry segments or their representatives. These comments, alternatives suggested by the Panel to mitigate adverse impacts on small businesses, and issues the Panel requested EPA take additional comment on are contained in the report of the Panel and are summarized below. Today's final rule incorporates the major recommendations of the Panel.

Fuel-Related Small Business Issues

Most of the small refiners stated that if they were required to achieve 30 ppm sulfur levels on average with an 80 ppm per-gallon cap without some regulatory relief, they would be forced out of business. Thus, the Panel devoted much attention to regulatory alternatives to address this concern. Most small refiners strongly supported delaying mandatory compliance for their facilities. On the other hand, most small refiners stated that a phase-in of gasoline sulfur standards would not be helpful because it would be more cost-effective for them to install the maximum technology required for the most stringent sulfur levels that would ultimately be imposed.

The Society of Independent Gasoline Marketers of America (SIGMA) commented that EPA should consider giving relief not only to refiners that meet the SBA definition of small refiner but also to refineries with relatively small production capacity that are owned by large refining companies. This was because a refinery with a small production capacity would operate essentially as an SBA-defined small refiner would. SIGMA also noted that small gasoline marketers would be affected by the closure of any refinery with small production capacity, whether it was owned by a large company or an SBA-defined small refining company.

The Panel recommended that small refiners be given a four to six year

period of relief during which less stringent gasoline sulfur requirements would apply. The Panel also advised that EPA specifically request comment on an alternative duration of ten years for the relief period. Small refiners would be assigned interim sulfur standards during this relief period based on their current individual refinery sulfur levels. Following this relief period, small refiners would be required to meet the industry-wide standard, although temporary hardship relief would be available on a case-by-case basis. The Panel concluded that additional time provided to small refiners before compliance with the industry-wide standard was required would allow (1) new sulfur-reduction technologies to be proven-out by larger refiners, (2) the costs of advanced technology units to drop as the volume of their sales increases, (3) industry engineering and construction resources to be freed-up, and (4) the acquisition of the necessary capital by small refiners.

The Panel also concluded that adding gasoline sulfur to the fuel parameters already being sampled and tested by gasoline marketers would likely result in little, if any, additional burden. Therefore, the Panel did not recommend any special provision for gasoline marketers.

EPA's final action on this issue closely follows the Panel's recommendations. You can find a description of the small refiner provisions of today's final rule in Section IV.C.2. above. Comments and our responses on related issues are collected in the Response to Comments document.

Vehicle-Related Small Business Issues

Independent commercial importers of vehicles (ICIs) suggested that the new emissions standards be phased-in with the phase-in schedule based on the small vehicle manufacturer's annual production volume. Secondly, the ICIs requested that small testing laboratories be permitted to use older technology dynamometers than proposed for use by the Agency. Finally, the ICIs commented that the certification process should be waived for certain foreign vehicles. Small-volume vehicle manufacturers (SVMs) stated that a phase-in of Tier-2 emissions standards is essential. They further stated that SVMs should not be required to comply until the end of the phase-in period, which should not be before model year 2007. The SVMs also stated that a case-by-case hardship relief provision should be provided for their members. SVMs requested that a credit program be established with incentives for larger

manufacturers to make credits available to SVMs in meeting their compliance goals.

Based on the above comments, the Panel advised that EPA consider several alternatives, individually or in combination, for the potential relief that they might provide to small certifiers of vehicles.

The Final Regulatory Flexibility Analysis evaluates the financial impacts of the proposed vehicle standards and fuel controls on small entities. EPA believes that the regulatory alternatives incorporated in today's final rule will provide substantial relief to small business from the potential adverse economic impacts of complying with today's proposed rule.

C. Paperwork Reduction Act

The information collection requirements (ICRs) associated with today's rule belong to two distinct categories: (1) those that pertain to amendments to the vehicle certification requirements, and (2) those that pertain to requirements for the control of gasoline sulfur content. These information collection requirements are contained in two separate ICR documents according to the category to which they belong.

The ICR in this final rule that pertains to the amendments to the vehicle certification requirements has been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* Copies of this ICR¹⁵⁷ can be obtained from Sandy Farmer, Office of Environmental Information, Collections Strategy Division, U.S. Environmental Protection Agency (Mail Code 2822), 401 M Street, SW, Washington, D.C. 20460, or by calling (202) 260-2740. Please refer to ICR #783.40 in any correspondence. Copies may also be downloaded from the internet at <http://www.epa.gov/icr>.

The ICR in this final rule that pertains to the requirements for the control of gasoline sulfur will be submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* The submission to OMB of the ICR document that contains this ICR and its availability to the public will be announced in a subsequent **Federal Register** notice.

¹⁵⁷ The information collection requirements associated with the amendments to the requirements for vehicle certification are contained in the Information Collection Request entitled "Amendments to the Reporting and Recordkeeping Requirements for Motor Vehicle Certification Under the Tier 2 Rule", OMB No. 2060-0114, EPA ICR # 783.40.

The Agency may not conduct or sponsor an information collection, and a person is not required to respond to a request for information unless the information collection request displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15. The OMB control numbers for the information collection requirements in this rule will be listed in an amendment to 40 CFR part 9 in a subsequent **Federal Register** notice after OMB approves the ICRs.

The Paperwork Reduction Act stipulates that ICR documents estimate the burden of activities required of regulated parties within a three year time period. Consequently, the ICR documents associated with today's final rule contain burden estimates for the activities that will be required under the first three years of the program.

ICRs Pertaining to the Amendments to Vehicle Certification Requirements: The information collection burden to vehicle certifiers associated with the amendments to the vehicle certification requirements in today's notice pertain to the fleet-average NO_x standard and emission credits provisions. These requirements are very similar to those under the voluntary National Low Emission Vehicle (NLEV) program, which includes a fleet-average standard for nonmethane hydrocarbon organic gases (NMOG) and associated emission credits provisions. The hours spent annually by a given vehicle certifier on the information collection activities associated with the these recordkeeping and reporting requirements depends upon certifier-specific variables, including: the scope/variety of their product line as reflected in the number of test groups and strategy used to comply with the fleet-average NO_x standard, the extent they utilize emissions credits provisions, and whether they opted into the NLEV program. Vehicle certifiers that use the provisions for early banking of emission credits will be subject to the associated information collection requirements as early as September 1, 2000.¹⁵⁸ All vehicle certifiers will be required to comply with the information collection requirements associated with the amendments to the vehicle certification program beginning September 1, 2003.¹⁵⁹ The ICR document for the amendments to the vehicle certification

program in this final rule provides burden estimates for all of the associated information collection requirements. The total information collection burden associated with the amendments to the vehicle certification requirements is estimated at 8,406 hours and \$567,217 annually for the certifiers of light-duty vehicles, medium-duty passenger vehicles, and light-duty trucks.

ICRs Pertaining to the Requirements for Gasoline Sulfur Control: The information collection burden to gasoline refiners, importers, marketers, distributors, retailers and wholesale purchaser-consumers (WPCs), and users of research and development (R&D) gasoline pertain to the gasoline sulfur control program in today's rule. The scope of the recordkeeping and reporting requirements for each regulated party, and therefore the cost to that party, reflects the party's opportunity to create, control, or alter the sulfur content of gasoline. As a result, refiners and importers have significant requirements, which are necessary both for their own tracking, and that of downstream parties, and for EPA enforcement. Parties downstream from the gasoline production or import point, such as retailers, have minimal burdens that are primarily associated with the transfer and retention of product transfer documents. Many of the reporting and recordkeeping requirements for refiners and importers regarding the sulfur content of gasoline currently exist under EPA's Reformulated Gasoline (RFG) and Anti-Dumping programs. The ICR for the RFG program covered start up costs associated with reporting gasoline sulfur content under the RFG program. Consequently, much of the cost of the information collection requirements under the gasoline sulfur control program has already been accounted for under the RFG program ICR. In addition, many of the information collection burdens associated with the sulfur program are the result of provisions designed to provide refiners with flexibility in demonstrating compliance with the sulfur standards in the early years of the program, such as the credit trading and small refiner programs.

The information collection requirements under the sulfur control program evolve over time as the program is phased-in. Beginning July 1, 2000, certain requirements apply to parties that voluntarily opt to generate credits for early sulfur reduction under the average banking and trading (ABT) provisions. Many of the requirements do not become applicable until the

beginning of the sulfur control program on October 1, 2003, when all refiners are required to meet the sulfur standards. The information collection requirements under the sulfur control program become stable after January 1, 2008, when the optional small refiner provisions expire.¹⁶⁰

The ICR document for the sulfur control program in this final rule will provide burden estimates for the activities required under the first three years of the program, from July 1, 2000, through June 30, 2003. The burden associated with activities required after June 30, 2003, will be estimated in later ICRs. The initial ICR for the gasoline sulfur control program, however, will provide a qualitative characterization of all of the required activities and associated burdens for the various regulated parties as they develop, and until they become stable after January 1, 2008.

In the ICR associated with the NPRM for this final rule, we estimated that the total burden of the information collection requirements that would be applicable during the first three years of the proposed gasoline sulfur control program would be 42,479 hours and \$2,149,865 annually.¹⁶¹ Annual burden estimates for the various regulated entities under the initial three year period of the gasoline sulfur control program were also provided in the NPRM ICR as follows:

- Refiners: 31,231 hours; \$1,879,822.
- Importers: 40 hours; \$2,067.
- Pipelines: 85 hours; \$2,785.
- Terminals: 1,700 hours; \$55,700.
- Truckers: 3,333 hours; \$118,000.
- Retailers/WPCs: 6,087 hours; \$91,298.
- R&D Gasoline Users: 3 hours; \$193.

We received few comments on the ICR burden estimates in the proposed sulfur rule. Most regulated parties have been fulfilling reporting, recordkeeping and testing requirements under the reformulated and conventional gasoline regulations. The only negative comments we received related to the batch testing for sulfur content and sample retention for conventional gasoline. We believe the estimated cost of complying with these requirements is somewhat higher than the actual

¹⁵⁸ These ICRs will become effective on the date that model year 2001 vehicles are introduced into commerce. EPA assumes that September 1, 2000 is the earliest date that model year 2001 vehicles will be marketed.

¹⁵⁹ Assuming model year 2004 vehicles are introduced into commerce on this date.

¹⁶⁰ A refiner can petition EPA for an extension of the small refiner provisions beyond January 1, 2008, based on hardship.

¹⁶¹ The information collection requirements associated with the proposed gasoline sulfur control program are contained in the Information Collection Request that accompanied the Tier 2 NPRM which is entitled "Recordkeeping and Reporting Requirements Regarding the Sulfur Content of Motor Vehicle Gasoline Under the Tier 2 Proposed Rule", ICR #1907.01. Copies of this ICR can be obtained as discussed earlier in this section.

burdens industry will realize. The ICR for this final rule will be adjusted accordingly.

We estimate that there will be some additional costs and hourly burdens over those estimated in the NPRM associated with certain changes made to the sulfur program from the NPRM to this final rule. In particular, this final rule includes a program which provides for relaxed standards in the early years of the program for refiners and importers who produce or import gasoline for use in certain states in the western U.S. This program requires some additional reporting and recordkeeping burdens for those refiners and importers who participate in the program, since they will be required to submit an application for the program, including a baseline for purposes of establishing their sulfur standard. This program requires gasoline intended for use in the geographic area to be identified on product transfer documents and segregated from other gasoline in the distribution system. This final rule also includes provisions for trading sulfur allotments to provide refiners and importers additional flexibility in meeting the corporate pool average standards. This program requires additional reporting and recordkeeping to track allotment trading activity. In addition, the final rule requires small refiners to submit information regarding their crude oil capacity in order to qualify for the small refiner standards under the rule. Small refiners are also required to submit reports of their progress toward compliance with the sulfur standards. The additional total annual cost and hourly burden over the first three years of the program, as a result of changes made to the program in the final rule, are estimated to add less than one percent to the overall burden estimates contained in the NPRM ICR for the sulfur control program.

Total Burden of the ICRs: In the NPRM, we estimated that the total burden of the recordkeeping and reporting requirements associated with the proposed vehicle certification and gasoline sulfur control requirements would be 50,840 hours and \$2,714,037 annually over the first three years that these requirements would be in effect. In the ICR document for this final rule which covers the ICRs for the vehicle certification program, the burden estimates were increased by 45 hours and \$3,045 over the burden estimates in the NPRM ICR. This increase reflects changes from the NPRM in the final rule associated the inclusion of the medium-duty passenger vehicles (MDPVs) under the program. As discussed above, we

anticipate that changes to the ICR document for this final rule which covers the ICRs for the sulfur control program will have burden estimates less than one percent higher than the estimates contained in the NPRM. Adding these increased costs to the burden estimates presented in the NPRM, we arrive at an estimate of the total burden of the recordkeeping and reporting requirements associated with the vehicle certification and gasoline sulfur control requirements in this final rule of less than 51,350 hours and \$2,742,000 annually over the first three years that these requirements will be in effect. These burden estimates will be more precisely stated in the forthcoming **Federal Register** notice which announces the submission to OMB of the ICR document for this final rule that covers the ICRs for the sulfur control program and the availability of this ICR document to the public.

D. Intergovernmental Relations

1. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104–4, establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “federal mandates” that may result in expenditures to state, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more for any single year. Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative that is not the least costly, most cost-effective, or least burdensome alternative if EPA provides an explanation in the final rule of why such an alternative was adopted.

Before we establish any regulatory requirement that may significantly or uniquely affect small governments, including tribal governments, we must develop a small government plan pursuant to section 203 of the UMRA. Such a plan must provide for notifying potentially affected small governments, and enabling officials of affected small

governments to have meaningful and timely input in the development of our regulatory proposals with significant federal intergovernmental mandates. The plan must also provide for informing, educating, and advising small governments on compliance with the regulatory requirements.

This rule contains no federal mandates for state, local, or tribal governments as defined by the provisions of Title II of the UMRA. The rule imposes no enforceable duties on any of these governmental entities. Nothing in the rule would significantly or uniquely affect small governments.

EPA has determined that this rule contains federal mandates that may result in expenditures of more than \$100 million to the private sector in any single year. EPA believes that today’s final rule represents the least costly, most cost-effective approach to achieve the air quality goals of the rule. The cost-benefit analysis required by the UMRA is discussed in Section IV.D. above and in the Draft RIA. See the “Administrative Designation” and Regulatory Analysis’ section in today’s preamble (VIII.A.) for further information regarding these analyses.

2. Executive Order 13084: Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian Tribal governments, and that imposes substantial direct compliance costs on those communities, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA’s prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments “to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.”

Today’s rule does not significantly or uniquely affect the communities of Indian Tribal governments. The motor

vehicle emissions, motor vehicle fuel, and other related requirements for private businesses in today's rule would have national applicability, and thus would not uniquely affect the communities of Indian Tribal Governments. Further, no circumstances specific to such communities exist that would cause an impact on these communities beyond those discussed in the other sections of today's document. Thus, EPA's conclusions regarding the impacts from the implementation of today's rule discussed in the other sections of this preamble are equally applicable to the communities of Indian Tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

3. Executive Order 13132 (Federalism)

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Under Section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

Section 4 of the Executive Order contains additional requirements for rules that preempt State or local law, even if those rules do not have federalism implications (*i.e.*, the rules will not have substantial direct effects on the States, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government). Those requirements include providing all affected State and local officials notice

and an opportunity for appropriate participation in the development of the regulation. If the preemption is not based on express or implied statutory authority, EPA also must consult, to the extent practicable, with appropriate State and local officials regarding the conflict between State law and Federally protected interests within the agency's area of regulatory responsibility.

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule adopts national emissions standards for certain categories of motor vehicles and national standards to control gasoline sulfur. The requirements of the rule will be enforced by the federal government at the national level. Thus, the requirements of section 6 of the Executive Order do not apply to this rule. Although section 6 of Executive Order 13132 does not apply to this rule, EPA did consult with State and local officials in developing this rule. In addition, EPA provided state and local officials an opportunity to comment on the proposed regulations. A summary of concerns raised by commenters, including state and local commenters, and EPA's response to those concerns, is found in the Response to Comments document for this rulemaking.

This final rule preempts State and local controls or prohibitions respecting gasoline sulfur content, pursuant to Section 211(c)(4) of the Clean Air Act. The basis and scope of preemption is described in Section IV.C.1.d of this notice. Although this rule was proposed before the November 2, 1999 effective date of Executive Order 13132, EPA provided State and local officials notice and an opportunity for appropriate participation when it published the proposed rule, as described above. Thus, EPA has complied with the requirements of section 4 of the Executive Order.

E. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Section 12(d) of Public Law 104-113, directs EPA to use voluntary consensus standards in its regulatory activities unless it would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications,

test methods, sampling procedures, and business practices) developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rule references technical standards adopted by the Agency through previous rulemakings. No new technical standards are established in today's rule. The standards referenced in today's rule involve the measurement of gasoline fuel parameters and motor vehicle emissions. The measurement standards for gasoline fuel parameters referenced in today's proposal are all voluntary consensus standards. The motor vehicle emissions measurement standards referenced in today's rule are government-unique standards that were developed by the Agency through previous rulemakings. These standards have served the Agency's emissions control goals well since their implementation and have been well accepted by industry. EPA is not aware of any voluntary consensus standards for the measurement of motor vehicle emissions. Therefore, the Agency is using the existing EPA-developed standards found in 40 CFR Part 86 for the measurement of motor vehicle emissions.

F. Executive Order 13045: Children's Health Protection

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, section 5-501 of the Order directs the Agency to evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is subject to the Executive Order because it is an economically significant regulatory action as defined by Executive Order 12866 and it concerns in part an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children.

This rulemaking will achieve significant reductions of various emissions from passenger cars and light trucks, primarily NO_x, but also NMOG

and PM. These pollutants raise concerns regarding environmental health or safety risks that EPA has reason to believe may have a disproportionate effect on children, such as impacts from ozone, PM and certain toxic air pollutants. See Section III of this preamble and the RIA for a further discussion of these issues.

The effects of ozone and PM on children's health were addressed in detail in EPA's rulemaking to establish the NAAQS for these pollutants, and we are not revisiting those issues here. We believe, however, that the emission reductions from the strategies established in this rulemaking will further reduce air toxics and the related adverse impacts on children's health. We will be addressing the issues raised by air toxics from motor vehicles and their fuels in a separate rulemaking that we will initiate in the near future under section 202(l) of the Act. That rulemaking will address the emissions of hazardous air pollutants from vehicles and fuels, and the appropriate level of control of HAPs from these sources.

In this final rule, we have evaluated several regulatory strategies for reductions in emissions from passenger cars and light trucks. (See sections IV, V, and VI of this preamble as well as the RIA.) For the reasons described there, we believe that these strategies are preferable under the Clean Air Act to other potentially effective and reasonably feasible alternatives that we considered for purposes of reducing emissions from these sources (as a way of helping areas achieve and maintain the NAAQS for ozone and PM). Moreover, we believe that we have selected for proposal the most stringent and effective control reasonably feasible at this time, in light of the technology and cost requirements of the Act.

G. Congressional Review Act

The congressional review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is a "major rule" as defined by 5 U.S.C. 804(2).

IX. Statutory Provisions and Legal Authority

Statutory authority for the vehicle controls set in today's final rule can be found in sections 202, 206, 207, 208, and 301 of the Clean Air Act (CAA), as amended, 42 U.S.C. sections 7521, 7525, 7541, 7542 and 7601.

Statutory authority for the fuel controls set in today's final rule comes from section 211(c) of the CAA (42 U.S.C., section 7545(c)), which allows EPA to regulate fuels that either contribute to air pollution which endangers public health or welfare or which impair emission control equipment. Both criteria are satisfied for the gasoline sulfur controls we are establishing today. Additional support for the procedural and enforcement-related aspects of the fuel's controls in today's final rule, including the record keeping requirements, comes from sections 114(a) and 301(a) of the CAA.

List of Subjects

40 CFR Part 80

Environmental protection, Air pollution control, Fuel additives, Gasoline, Imports, Incorporation by reference, Labeling, Motor vehicle pollution, Penalties, Reporting and recordkeeping requirements.

40 CFR Part 85

Environmental protection, Administrative practice and procedure, Confidential business information, Imports, Labeling, Motor vehicle pollution, Penalties, Reporting and recordkeeping requirements, Research, Warranties.

40 CFR Part 86

Environmental protection, Administrative practice and procedure, Confidential business information, Incorporation by reference, Labeling, Motor vehicle pollution, Penalties, Reporting and recordkeeping requirements.

Dated: December 21, 1999.

Carol M. Browner,
Administrator.

For the reasons set forth in the preamble, parts 80, 85 and 86 of title 40, of the Code of Federal Regulations are amended as follows:

PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

1. The authority citation for part 80 continues to read as follows:

Authority: Secs. 114, 211, and 301(a) of the Clean Air Act, as amended (42 U.S.C. 7414, 7545 and 7601(a)).

2. Section 80.2 is amended by removing and reserving paragraph (aa), adding paragraph (d), and revising paragraphs (h), (s) and (gg) to read as follows:

§ 80.2 Definitions.

* * * * *

(d) *Previously certified gasoline* means gasoline or RBOB that previously has been included in a batch for purposes of complying with the standards for reformulated gasoline, conventional gasoline or gasoline sulfur, as appropriate.

* * * * *

(h) *Refinery* means any facility, including but not limited to, a plant, tanker truck, or vessel where gasoline or diesel fuel is produced, including any facility at which blendstocks are combined to produce gasoline or diesel fuel, or at which blendstock is added to gasoline or diesel fuel.

* * * * *

(s) *Gasoline blending stock, blendstock, or component* means any liquid compound which is blended with other liquid compounds to produce gasoline.

* * * * *

(gg) *Batch of gasoline* means a quantity of gasoline that is homogeneous with regard to those properties that are specified for conventional or reformulated gasoline.

* * * * *

3. Section 80.46 is amended by revising paragraphs (a) and (h) to read as follows:

§ 80.46 Measurement of reformulated gasoline fuel parameters.

(a) *Sulfur.* Sulfur content of gasoline and butane must be determined by use of the following methods:

(1) The sulfur content of gasoline must be determined by use of American Society for Testing and Materials (ASTM) standard method D 2622-98, entitled "Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-ray Fluorescence Spectrometry."

(2) The sulfur content of butane must be determined by the use of ASTM standard method D 3246-96, entitled "Standard Test Method for Sulfur in Petroleum Gas by Oxidative Microcoulometry."

* * * * *

(h) *Incorporations by reference.* ASTM standard methods D 2622-98, D 3246-96, D 3606-92, D 1319-93, D 4815-93, and D 86-90 with the exception of the degrees Fahrenheit figures in Table 9 of D 86-90, are incorporated by reference. These

incorporations by reference were approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the American Society for Testing and Materials, 100 Barr Harbor Dr., West Conshohocken, PA 19428. Copies may be inspected at the Air Docket Section (LE-131), room M-1500, U.S. Environmental Protection Agency, Docket No. A-97-03, 401 M Street, SW., Washington, DC 20460, or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

4. Subpart H is added to part 80 to read as follows:

Subpart H—Gasoline Sulfur

General Information

Sec.

80.180 [Reserved]

80.185 [Reserved]

80.190 Who must register with EPA under the sulfur program?

Gasoline Sulfur Standards

80.195 What are the gasoline sulfur standards for refiners and importers?

80.200 What gasoline is subject to the sulfur standards and requirements?

80.205 How is the annual refinery or importer average and corporate pool average sulfur level determined?

80.210 What sulfur standards apply to gasoline downstream from refineries and importers?

80.211 [Reserved]

80.212 What requirements apply to oxygenate blenders?

80.213–80.214 [Reserved]

Geographic Phase-In Program

80.215 What is the scope of the geographic phase-in program?

80.216 What standards apply to gasoline produced or imported for use in the GPA?

80.217 How does a refiner or importer apply for the GPA standards?

80.218 [Reserved]

80.219 Designation and downstream requirements for GPA gasoline.

80.220 What are the downstream standards for GPA gasoline?

Hardship Provisions

80.225 What is the definition of a small refiner?

80.230 Who is not eligible for the hardship provisions for small refiners?

80.235 How does a refiner obtain approval as a small refiner?

80.240 What are the small refiner gasoline sulfur standards?

80.245 How does a small refiner apply for a sulfur baseline?

80.250 How is the small refiner sulfur baseline and volume determined?

80.255 Compliance plans and demonstration of commitment to produce low sulfur gasoline.

80.260 What are the procedures and requirements for obtaining a hardship extension?

80.265 How will the EPA approve or disapprove a hardship extension application?

80.270 Can a refiner seek temporary relief from the requirements of this subpart?

Allotment Trading Program

80.275 How are allotments generated and used?

Averaging, Banking and Trading (ABT) Program—General Information

80.280 [Reserved]

80.285 Who may generate credits under the ABT program?

80.290 How does a refiner apply for a sulfur baseline?

ABT Program—Baseline Determination

80.295 How is a refinery sulfur baseline determined?

80.300 [Reserved]

ABT Program—Credit Generation

80.305 How are credits generated during the time period 2000 through 2003?

80.310 How are credits generated beginning in 2004?

ABT Program—Credit Use

80.315 How are credits used and what are the limitations on credit use?

80.320 [Reserved]

80.325 [Reserved]

Sampling, Testing and Retention Requirements for Refiners and Importers

80.330 What are the sampling and testing requirements for refiners and importers?

80.335 What gasoline sample retention requirements apply to refiners and importers?

80.340 What standards and requirements apply to refiners producing gasoline by blending blendstocks into previously certified gasoline (PCG)?

80.345 [Reserved]

80.350 What alternative sulfur standards and requirements apply to importers who transport gasoline by truck?

80.355 [Reserved]

Recordkeeping and Reporting Requirements

80.360 [Reserved]

80.365 What records must be kept?

80.370 What are the sulfur reporting requirements?

80.371–80.373 [Reserved]

Exemptions

80.374 What if a refiner or importer is unable to produce gasoline conforming to the requirements of this subpart?

80.375 What requirements apply to California gasoline?

80.380 What are the requirements for obtaining an exemption for gasoline used for research, development or testing purposes?

Violation Provisions

80.385 What acts are prohibited under the gasoline sulfur program?

80.390 What evidence may be used to determine compliance with the prohibitions and requirements of this subpart and liability for violations of this subpart?

80.395 Who is liable for violations under the gasoline sulfur program?

80.400 What defenses apply to persons deemed liable for a violation of a prohibited act?

80.405 What penalties apply under this subpart?

Provisions for Foreign Refiners With Individual Sulfur Baselines

80.410 What are the additional requirements for gasoline produced at foreign refineries having individual small refiner sulfur baselines, foreign refineries granted temporary relief under § 80.270, or baselines for generating credits during 2000 through 2003?

Attest Engagements

80.415 What are the attest engagement requirements for gasoline sulfur compliance applicable to refiners and importers?

Subpart H—Gasoline Sulfur

General Information

§ 80.180 [Reserved]

§ 80.185 [Reserved]

§ 80.190 Who must register with EPA under the sulfur program?

(a) Refiners and importers who are registered by EPA under § 80.76 are deemed to be registered for purposes of this subpart.

(b) Refiners and importers subject to the standards in § 80.195 who are not registered by EPA under § 80.76 must provide to EPA the information required by § 80.76 by November 1, 2003, or not later than three months in advance of the first date that such person produces or imports gasoline, whichever is later.

(c) Refiners with any refinery subject to the small refiner standards under § 80.240, or refiners subject to the geographic phase-in area (GPA) standards under § 80.216, who are not registered by EPA under § 80.76 must provide to EPA the information required under § 80.76 by December 31, 2000.

(d) Any refiner who plans to generate credits or allotments under § 80.305 or § 80.275 in any year prior to 2004 who is not registered by EPA under § 80.76 must register under § 80.76 no later than September 30 of the year prior to the first year of credit generation. Any refiner who plans to generate credits in 2000 who is not registered by EPA under § 80.76 must register under § 80.76 no later than May 10, 2000.

Gasoline Sulfur Standards**§ 80.195 What are the gasoline sulfur standards for refiners and importers?**

(a)(1) The gasoline produced by small refiners subject to the standards at

§ 80.240, and gasoline designated as GPA gasoline under § 80.219(a), are as follows:

	Gasoline sulfur standards for the averaging period beginning:		
	January 1, 2004	January 1, 2005	January 1, 2006 and subsequent
Refinery or Importer Average	(1)	30.00	30.00
Corporate Pool Average	120.00	90.00	(1)
Per-Gallon Cap	300	300	80

¹ Not applicable.

(2) The sulfur standards and all compliance calculations for sulfur under this subpart are in parts per million (ppm) and volumes are in gallons.

(3) The averaging period is January 1 through December 31 of each year.

(4) The standards under this paragraph (a) for all imported gasoline shall be met by the importer.

(b)(1) The refinery or importer annual average gasoline sulfur standard is the maximum average sulfur level allowed for gasoline produced at a refinery or imported by an importer during each calendar year starting January 1, 2005.

(2) The annual average sulfur level is calculated in accordance with § 80.205.

(3) The refinery or importer annual average gasoline sulfur standard may be met using credits as provided under § 80.275 or § 80.315.

(4) In 2005 only, the refinery or importer annual average sulfur standard may be met using credits or allotments as provided under § 80.275 or credits as provided under § 80.315.

(c)(1) The corporate pool average gasoline sulfur standards applicable in 2004 and 2005 are the maximum average sulfur levels allowed for a refiner's or importer's gasoline production from all of the refiner's refineries or all gasoline imported by an importer in a calendar year. The corporate pool average standards for a party that is both a refiner and an importer are the maximum average sulfur levels allowed for all the party's combined gasoline production from all refineries and imported gasoline in a calendar year.

(2) The corporate pool average is calculated in accordance with the provisions of § 80.205.

(3) The corporate pool average standard may be met using sulfur allotments under § 80.275.

(4) The corporate pool average standards do not apply to approved

small refiners subject to the small refiner gasoline sulfur standards under § 80.240.

(5)(i) Joint ventures, in which two or more parties collectively own and operate one or more refineries, will be treated as a separate refiner under this section.

(ii) One partner to a joint venture may include one or more joint venture refineries in its corporate pool for purposes of complying with the corporate pool average standards. The joint venture will be in compliance for such joint venture refinery(ies) if the partner's corporate pool average meets the corporate pool average standards. The joint venture entity must demonstrate compliance with the corporate pool average standards for any refinery(ies) owned by the joint venture that are not included in one partner's corporate pool.

(d)(1) The per-gallon cap standard is the maximum sulfur level allowed for each batch of gasoline produced or imported starting January 1, 2004.

(2) In 2004 only, a refiner or importer may produce or import gasoline with a per-gallon sulfur content greater than 300 ppm, to a maximum of 350 ppm, provided the following conditions are met:

(i) The refinery or importer becomes subject to an adjusted per-gallon cap standard in 2005, calculated using the following formula:

$$ACS = 300 - (S_{\max} - 300)$$

Where:

ACS=Adjusted cap standard.

S_{\max} =Maximum sulfur content of any gasoline produced at a refinery or imported by an importer during 2004.

(ii) The adjusted cap standard calculated under paragraph (d)(2)(i) of this section applies to all gasoline produced at a refinery or imported by an importer during 2005.

(iii) The refinery or importer remains subject to the 30.00 average standard under paragraph (a) of this section for 2005.

(iv) The provisions of this paragraph (d)(2) apply to gasoline designated as GPA gasoline under § 80.219(a).

(v) The provisions of this paragraph (d)(2) do not apply to small refiners as defined in § 80.225.

§ 80.200 What gasoline is subject to the sulfur standards and requirements?

For the purpose of this subpart, all reformulated and conventional gasoline and RBOB, collectively called "gasoline" unless otherwise specified, is subject to the standards and requirements under this subpart, with the following exceptions:

(a) Gasoline that is used to fuel aircraft, racing vehicles or racing boats that are used only in sanctioned racing events, provided that:

(1) Product transfer documents associated with such gasoline, and any pump stand from which such gasoline is dispensed, identify the gasoline either as gasoline that is restricted for use in aircraft, or as gasoline that is restricted for use in racing motor vehicles or racing boats that are used only in sanctioned racing events;

(2) The gasoline is completely segregated from all other gasoline throughout production, distribution and sale to the ultimate consumer; and

(3) The gasoline is not made available for use as motor vehicle gasoline, or dispensed for use in motor vehicles, except for motor vehicles used only in sanctioned racing events.

(b) California gasoline as defined in § 80.375.

(c) Gasoline that is exported for sale outside the U.S.

§ 80.205 How is the annual refinery or importer average and corporate pool average sulfur level determined?

(a) The annual refinery or importer average and corporate pool average gasoline sulfur level is calculated as follows:

$$S_a = \frac{\sum_{i=1}^n (V_i \times S_i)}{\sum_{i=1}^n V_i}$$

Where:

S_a =The refinery or importer annual average sulfur value, or corporate pool average sulfur value, as applicable.

V_i =The volume of gasoline produced or imported in batch i .

S_i =The sulfur content of batch i determined under § 80.330.

n =The number of batches of gasoline produced or imported during the averaging period.

i =Individual batch of gasoline produced or imported during the averaging period.

(b) All annual refinery or importer average or corporate pool average calculations shall be conducted to two decimal places.

(c) A refiner or importer may include oxygenate added downstream from the refinery or import facility when calculating the sulfur content, provided the following requirements are met:

(1) For oxygenate added to conventional gasoline, the refiner or importer must comply with the requirements of § 80.101(d)(4)(ii).

(2) For oxygenate added to RBOB, the refiner or importer must comply with the requirements of § 80.69(a).

(d) Refiners and importers must exclude from compliance calculations all of the following:

(1) Gasoline that was not produced at the refinery;

(2) In the case of an importer, gasoline that was imported as Certified Sulfur-FRGAS;

(3) Blending stocks transferred to others;

(4) Gasoline that has been included in the compliance calculations for another refinery or importer; and

(5) Gasoline exempted from standards under § 80.200.

(e)(1) A refiner or importer may exceed the refinery or importer annual average sulfur standard specified in § 80.195 for a given averaging period for any calendar year through 2010, creating a compliance deficit, provided that in the calendar year following the year the standard is not met, the refinery or importer shall:

(i) Achieve compliance with the refinery or importer annual average sulfur standard specified in § 80.195; and

(ii) Use additional sulfur credits sufficient to offset the compliance deficit of the previous year.

(2) No refiner or importer may have a compliance deficit in any year after 2010. Any deficit that exists in 2010 must be made up in 2011.

(f) For refiners subject to the corporate pool average who produce some GPA gasoline, the refinery average sulfur value for its GPA gasoline shall be the average sulfur value after applying credits.

§ 80.210 What sulfur standards apply to gasoline downstream from refineries and importers?

The sulfur standard for gasoline at any point in the gasoline distribution system downstream from refineries and import facilities, including gasoline at facilities of distributors, carriers, oxygenate blenders, retailers and wholesale purchaser-consumers ("downstream location"), shall be determined in accordance with the provisions of this section.

(a) *Definition. S-RGAS* means gasoline that is subject to the standards under § 80.240 or § 80.270, including Certified Sulfur-FRGAS as defined in § 80.410, except that no batch of gasoline may be classified as S-RGAS if the actual sulfur content is less than the applicable per-gallon refinery cap standard specified in § 80.195.

(b) *Standards for gasoline that does not qualify for S-RGAS downstream standards.* The following standards apply to any gasoline that does not qualify for S-RGAS downstream standards under in paragraph (d) of this section:

(1) Starting February 1, 2004 the sulfur content of gasoline at any downstream location other than at a retail outlet or wholesale purchaser-consumer facility, and starting March 1, 2004 the sulfur content of gasoline at any downstream location, shall not exceed 378 ppm.

(2) Except as provided in § 80.220(a), starting February 1, 2005 the sulfur content of gasoline at any downstream location other than at a retail outlet or wholesale purchaser-consumer facility, and starting March 1, 2005 the sulfur content of gasoline at any downstream location, shall not exceed 326 ppm.

(3) Except as provided in § 80.220(a), starting February 1, 2006 the sulfur content of gasoline at any downstream location other than at a retail outlet or wholesale purchaser-consumer facility, and starting March 1, 2006 the sulfur

content of gasoline at any downstream location, shall not exceed 95 ppm.

(c) *Standards for gasoline that qualifies for S-RGAS downstream standards.* In the case of any gasoline that qualifies for S-RGAS downstream standards under paragraph (d) of this section, the sulfur standard shall be the downstream standard for the gasoline calculated under paragraph (f) of this section. In the case of mixtures of gasoline that qualify for different S-RGAS downstream standards, the sulfur standard shall be the highest downstream standard applicable to any of the S-RGAS in the mixture.

(d) *Gasoline that qualifies for S-RGAS downstream standards.* Gasoline qualifies for S-RGAS downstream standards if all of the following conditions are met:

(1) The gasoline must be comprised in whole or part of S-RGAS.

(2) Product transfer documents applicable to the gasoline when received at that location must represent that the gasoline contains S-RGAS.

(3) Except as provided in paragraph (d)(4) of this section, the gasoline must have been sampled and tested at that location subsequent to the most recent receipt of gasoline at that location, and the test result must show a sulfur content greater than:

(i) 350 ppm starting February 1, 2004;

(ii) 300 ppm starting February 1, 2005; and

(iii) 80 ppm (or in the GPA, 300 ppm) starting February 1, 2006.

(4) This sampling and testing condition does not apply for gasoline at any retail outlet, wholesale purchaser-consumer facility, or contained in any transport truck.

(e) *Product transfer document information for S-RGAS.* (1) On each occasion when any refiner or importer of S-RGAS transfers custody or title to such gasoline, the refiner or importer shall provide to the transferee documents that include the following information:

(i) Identification of the gasoline as being S-RGAS; and

(ii) The downstream standard applicable to the batch of gasoline under paragraph (f) of this section.

(2) Where gasoline in whole or part is classified as S-RGAS when received by the transferor, and where the gasoline transferred meets the conditions under paragraph (d) of this section, the transferor shall provide to the transferee, on each occasion when custody or title to gasoline is transferred, documents that include the following information:

(i) Identification of the gasoline as S-RGAS; and

(ii) The applicable downstream standard under paragraph (c) of this section. This does not apply when gasoline is sold or dispensed for use in motor vehicles at a retail outlet or wholesale purchaser-consumer facility.

(3) No person shall classify gasoline as being S-RGAS except as provided in paragraphs (e)(1) and (e)(2) of this section.

(4) Product codes may be used to convey the information required by paragraphs (e)(1) and (e)(2) of this section if such codes are clearly understood by each transferee.

(f) *Downstream standards applicable to S-RGAS when produced or imported.*

(1) The downstream standard applicable to any gasoline classified as S-RGAS when produced or imported shall be calculated using the following equation:

$$D=S+105\times((S+2)/10^4)^{0.4}$$

Where:

D=Downstream sulfur standard.

S=The sulfur content of the refiner's batch determined under § 80.330.

(2) Where more than one S-RGAS batch is combined, prior to shipment, at the refinery or import facility where the S-RGAS is produced or imported, the downstream standard applicable to the mixture shall be the highest downstream standard, calculated under paragraph (f)(1) of this section, for any S-RGAS contained in the mixture.

§ 80.211 [Reserved]

§ 80.212 What requirements apply to oxygenate blenders?

Effective January 1, 2004, oxygenate blenders who blend oxygenate into gasoline downstream of the refinery that produced the gasoline or the import facility where the gasoline was imported, are not subject to the requirements of this subpart applicable to refiners for this gasoline, but are subject to the requirements and prohibitions applicable to downstream parties and the prohibition specified in § 80.385(e).

§§ 80.213–80.214 [Reserved]

Geographic Phase-In Program

§ 80.215 What is the scope of the geographic phase-in program?

(a) *Geographic phase-in area.* (1) The following states comprise the geographic phase-in area (GPA) subject to the provisions of the geographic phase-in program: North Dakota, Montana, Idaho, Wyoming, Utah, Colorado, New Mexico, and Alaska.

(2) Additional counties or tribal lands in states adjacent to the states identified in paragraph (a) of this section will be

included in the GPA if any of the following criteria is met:

(i) Approximately 50% or more of the total volume of gasoline in the county or tribal land in 1999, as measured at the terminal(s) and bulk station(s) in the county or tribal land, was received from a refinery or refineries located in the area specified in paragraph (a)(1) of this section; or

(ii) Approximately 50% or more of the total volume of gasoline dispensed in the county or tribal land in 1999 was received from a refinery or refineries located in the area specified in paragraph (a)(1) of this section; or

(iii) Approximately 50% or more of the total commercial and private dispensing outlets in the county or tribal land in 1999 were supplied by gasoline produced by a refinery or refineries located in the area specified in paragraph (a)(1) of this section.

(3) The criteria of paragraphs (a)(2)(i), (ii) and (iii) of this section are without regard to the method of gasoline delivery (e.g., pipeline, truck, rail or barge). The criteria of paragraphs (a)(2)(ii) and (a)(2)(iii) of this section are without regard to whether the gasoline was transported directly from the refinery to the dispensing outlet or distributed through a terminal or bulk station.

(b) *Duration of the program.* The geographic phase-in program applies to the 2004, 2005, and 2006 annual averaging periods.

(c) *Persons eligible.* Any refiner or importer who produces or imports gasoline for use in the geographic area under paragraph (a) of this section is eligible to apply for the geographic phase-in program. The provisions of the geographic phase-in program shall apply to imported gasoline through the importer.

§ 80.216 What standards apply to gasoline produced or imported for use in the GPA?

(a)(1) The refinery or importer annual average sulfur standard for gasoline produced or imported for use in the geographic area under § 80.215 shall be the lesser of:

(i) 150 ppm; or

(ii) The refinery's or importer's 1997/1998 average sulfur level, calculated in accordance with § 80.295, plus 30 ppm.

(2) In the case of any refinery whose actual annual sulfur average decreases to a level lower than the refinery's annual average sulfur standard established under paragraph (a)(1) of this section during the period 2000 through 2003, the standard applicable to that refinery from 2004 through 2006 shall be the lowest average sulfur content for any year in which the

refinery generated allotments or credits under § 80.275(a) or § 80.305 plus 30 ppm, not to exceed 150 ppm.

(b) The per-gallon cap standard for gasoline produced or imported for use in the GPA under paragraph (a) of this section shall be 300 ppm, except as specified in § 80.195(d).

(c) The refinery or importer annual average sulfur level is calculated in accordance with the provisions of § 80.205.

(d) The refinery or importer annual average standard under paragraph (a) of this section may be met using sulfur allotments or credits as provided under §§ 80.275 and 80.315.

(e) Gasoline produced by approved small refiners subject to the standards under § 80.240 is not subject to the standards under paragraphs (a) and (b) of this section.

(f)(1) A refiner or importer whose gasoline production or volume of imported gasoline in 2004 or 2005 is comprised of ≥50% of gasoline designated as GPA gasoline under § 80.219 shall not be required to meet the corporate pool average standards under § 80.195 for its gasoline production or imported gasoline during the applicable averaging period.

(2) A refiner or importer whose gasoline production or volume of imported gasoline in 2004 or 2005 is comprised of less than 50% of gasoline designated as GPA gasoline under § 80.219 must meet the corporate pool average standards under § 80.195 for all the refiner's gasoline production or the importer's volume of imported gasoline during the applicable averaging period.

(g) The provisions for compliance deficits under § 80.205(e) do not apply to gasoline subject to the standards under paragraphs (a) and (b) of this section.

§ 80.217 How does a refiner or importer apply for the GPA standards?

(a) To apply for the GPA standards under § 80.216, a refiner or importer must submit an application in accordance with the provisions of § 80.290.

(b) Applications under paragraph (a) of this section must be submitted by December 31, 2000.

(c)(1) If approved, EPA will notify the refiner or importer of each refinery's or the importer's annual average sulfur standard for gasoline produced for use in the GPA for the 2004 through 2006 annual averaging periods.

(2) If disapproved, the refiner or importer must comply with the standards in § 80.195 for gasoline produced for use in the GPA.

(d) If EPA finds that a refiner or importer provided false or inaccurate

information on its application under this section, upon notice from EPA, the refiner's or importer's application will be void *ab initio*.

§ 80.218 [Reserved]

§ 80.219 Designation and downstream requirements for GPA gasoline.

The requirements and prohibitions specified in this section apply during the period January 1, 2004 through December 31, 2006.

(a) *Designation.* Any refiner or importer shall designate any gasoline produced or imported that is subject to the standards under § 80.216 as "GPA" gasoline.

(b) *Product transfer documents.* (1) On each occasion that any person transfers custody or title to gasoline designated as GPA gasoline, other than when gasoline is sold or dispensed for use in motor vehicles at a retail outlet or wholesale purchaser-consumer facility, the transferor shall provide to the transferee documents that include the following information:

(i) Identification of the gasoline as being GPA gasoline;

(ii) A statement that the gasoline may not be distributed or sold for use outside the geographic phase-in area.

(2) Except for transfers to truck carriers, retailers and wholesale purchaser-consumers, product codes may be used to convey the information required by paragraph (b)(1) of this section if such codes are clearly understood by each transferee.

(3) The requirements under paragraph (b)(1) of this section are in addition to the requirement under § 80.210(e), where appropriate, to identify gasoline as being S-RGAS.

(c) *GPA gasoline use prohibitions.* (1) All parties in the distribution system, including refiners, importers, distributors, carriers, oxygenate blenders, retailers and wholesale purchaser-consumers, are prohibited from:

(i) Selling, offering for sale, dispensing, distributing, storing or transporting GPA gasoline for use outside the geographic phase-in area; and

(ii) Commingling GPA gasoline with gasoline not designated as GPA gasoline unless the mixture is classified as GPA gasoline.

(2) Gasoline not designated as GPA gasoline may be distributed or sold for use in the geographic phase-in area.

§ 80.220 What are the downstream standards for GPA gasoline?

(a) *GPA gasoline.* (1) During the period February 1, 2004 through January 31, 2005, the sulfur content of GPA

gasoline at any downstream location other than at a retail outlet or wholesale purchaser-consumer facility, and during the period March 1, 2004 through February 28, 2005, the sulfur content of GPA gasoline at any downstream location shall not exceed 378 ppm.

(2) During the period February 1, 2005 through January 31, 2007, the sulfur content of GPA gasoline at any downstream location other than at a retail outlet or wholesale purchaser-consumer facility, and during the period March 1, 2005 through February 28, 2007, the sulfur content of GPA gasoline at any downstream location shall not exceed 326 ppm.

(b) *GPA gasoline mixed with S-RGAS.* Notwithstanding the requirements in paragraph (a) of this section, the sulfur standard applicable to a mixture of GPA gasoline and S-RGAS gasoline at a downstream location shall be the greater of the standard under paragraph (a) of this section or the standard determined under § 80.210.

Hardship Provisions

§ 80.225 What is the definition of a small refiner?

(a) A *small refiner* is defined as any person, as defined by 42 U.S.C. 7602(e), who: (1)(i) Produces gasoline at a refinery by processing crude oil through refinery processing units;

(ii) Employed an average of no more than 1,500 people, based on the average number of employees for all pay periods from January 1, 1998, to January 1, 1999; and

(iii) Had an average crude capacity less than or equal to 155,000 barrels per calendar day (bpcd) for 1998.

(2) For the purpose of determining the number of employees and crude capacity under paragraph (a)(1) of this section, the refiner shall include the employees and crude capacity of any subsidiary companies, any parent company and subsidiaries of the parent company, and any joint venture partners.

(b) The definition under paragraph (a) of this section applies to domestic and foreign refiners. For any refiner owned by a governmental entity, the number of employees as specified in paragraph (a) of this section shall include all employees of the governmental entity.

(c) If, without merger with, or acquisition of, another business unit, a company with approved small refiner status under § 80.235 exceeds 1,500 employees, or a corporate crude capacity of 155,000 bpcd after January 1, 1999, it will be considered a small refiner for the duration of the small refiner program.

(d) Notwithstanding the definition in paragraph (a) of this section, refiners who acquire a refinery after January 1, 1999, or reactivate a refinery that was shutdown or was non-operational between January 1, 1998, and January 1, 1999, may apply for small refiner status in accordance with the provisions of § 80.235.

§ 80.230 Who is not eligible for the hardship provisions for small refiners?

(a) The following are not eligible for the hardship provisions for small refiners:

(1) Refiners of refineries built after January 1, 1999;

(2) Refiners who exceed the employee or crude oil capacity criteria under § 80.225(a) on January 1, 1999, but who meet these criteria after that date, regardless of whether the reduction in employees or crude capacity is due to operational changes at the refinery or a company sale or reorganization;

(3) Importers; and

(4) Refiners who produce gasoline other than by processing crude oil through refinery processing units.

(b)(1) Refiners who qualify as small under § 80.225, and subsequently employ more than 1,500 people as a result of merger with or acquisition of or by another entity, are disqualified as small refiners. If this occurs the refiner shall notify EPA in writing no later than 20 days following this disqualifying event.

(2) Any refiner who qualifies as small under § 80.225 may elect to meet the standards under § 80.195 by notifying EPA in writing no later than November 15 prior to the year the change will occur.

(3) Any refiner whose status changes under paragraph (b)(1) or (2) of this section shall meet the standards under § 80.195 beginning with the first averaging period subsequent to the status change.

§ 80.235 How does a refiner obtain approval as a small refiner?

(a) Applications for small refiner status must be submitted to EPA by December 31, 2000, except for applications submitted pursuant to § 80.225(d), which must be submitted by June 1, 2002.

(b) Applications for small refiner status must be sent to: U.S. EPA, Attn: Sulfur Program (6406J), 401 M Street, SW, Washington, DC 20460. For commercial delivery: U.S. EPA, Attn: Sulfur Program (6406J), 501 3rd Street, NW, Washington, DC 20001.

(c) The small refiner status application must contain the following information for the company seeking

small refiner status, plus any subsidiary companies, any parent company and subsidiaries of the parent company, and any joint venture partners:

(1)(i) A listing of the name and address of each location where any employee worked during the 12 months preceding January 1, 1999; the average number of employees at each location based upon the number of employees for each pay period for the 12 months preceding January 1, 1999; and the type of business activities carried out at each location; or

(ii) In the case of a refiner who acquires a refinery after January 1, 1999, or reactivates a refinery that was shutdown between January 1, 1998, and January 1, 1999, a listing of the name and address of each location where any employee of the refiner worked since the refiner acquired or reactivated the refinery; the average number of employees at any such acquired or reactivated refinery during each calendar year since the refiner acquired or reactivated the refinery; and the type of business activities carried out at each location.

(2) The total corporate crude capacity of each refinery as reported to the

Energy Information Administration (EIA) of the U.S. Department of Energy (DOE). The information submitted to EIA is presumed to be correct. In cases where a company disagrees with this information, the company may petition EPA with appropriate data to correct the record within 60 days after the company submits its application for small refiner status.

(3) A letter signed by the president, chief operating or chief executive officer of the company, or his/her designee, stating that the information contained in the application is true to the best of his/her knowledge.

(4) Name, address, phone number, facsimile number and E-mail address (if available) of a corporate contact person.

(d) For joint ventures, the total number of employees includes the combined employee count of all corporate entities in the venture.

(e) For government-owned refiners, the total employee count includes all government employees.

(f) Approval of small refiner status for refiners who apply under § 80.225(d) will be based on all information submitted under paragraph (c) of this section. Where appropriate, the

employee and crude oil capacity criteria for such refiners will be based on the most recent 12 months of operation.

(g) EPA will notify a refiner of approval or disapproval of small refiner status by letter.

(1) If approved, EPA will notify the refiner of each refinery's applicable baseline standard and volume, and per-gallon cap under § 80.240.

(2) If disapproved, the refiner must comply with the standards in § 80.195.

(h) If EPA finds that a refiner provided false or inaccurate information on its application for small refiner status, upon notice from EPA the refiner's small refiner status will be void ab initio.

(i) Upon notification to EPA, an approved small refiner may withdraw its status as a small refiner. Effective on January 1 of the year following such notification, the small refiner will become subject to the standards at § 80.195.

§ 80.240 What are the small refiner gasoline sulfur standards?

(a) The gasoline sulfur standards for an approved small refiner are as follows:

Refinery baseline sulfur level	Temporary sulfur standards for small refiners applicable from January 1, 2004 through December 31, 2007	
	Annual average	Per gallon cap
0 to 30	30.00	300
31 to 200	Baseline level	300
201 to 400	200.00	300
401 to 600	50% of baseline	Factor of 1.5 times the average standard.
601 and above	300.00	450

(b) The refinery annual average sulfur standards must be met on an annual calendar year basis for each refinery owned by a small refiner. The refinery annual average sulfur level is calculated in accordance with the provisions of § 80.205.

(c)(1) The refinery annual average standards specified in paragraph (a) of this section apply to the volume of gasoline produced by a small refiner's refinery up to the lesser of:

(i) 105% of the baseline gasoline volume as determined under § 80.250(a)(1); or

(ii) The volume of gasoline produced at that refinery during the averaging period by processing crude oil.

(2) If a refiner exceeds the volume limitation in paragraph (c)(1) of this section during any averaging period, the annual average sulfur standard applicable to the refiner for that

averaging period is calculated as follows:

$$S_{sr} = \frac{(V_b \times S_b) + (AF \times (V_a - V_b))}{V_a}$$

Where:

S_{sr} = Small refiner annual average sulfur standard.

V_b = Applicable volume under paragraph (c)(1) of this section.

V_a = Averaging period gasoline volume.

S_b = Small refiner sulfur baseline as determined under § 80.250.

AF = Adjustment factor (120 in 2004; 90 in 2005; and 30 in 2006 and thereafter).

(3) The small refiner average standards under paragraph (a) of this section may be met using sulfur allotments or credits as provided under § 80.275 or § 80.315.

(4) The provisions for compliance deficits under § 80.205(e) do not apply to small refiners subject to the standards under this section.

(d) In the case of any refiner with small refiner status who generates sulfur allotments or credits pursuant to § 80.275(a) or § 80.305, the baseline applicable to that refiner's refinery for purposes of establishing the standard for the refinery under paragraph (a) of this section beginning in 2004 shall be the lowest annual average sulfur content for any year during the period in which the refiner generated allotments or credits.

§ 80.245 How does a small refiner apply for a sulfur baseline?

(a) Any refiner seeking small refiner status must apply for a refinery sulfur baseline by the deadline under § 80.235 for each of the refiner's refineries by providing the following information:

(1) A sulfur baseline and baseline volume for every refinery calculated in accordance with § 80.250.

(2) The following information for each batch of gasoline produced in 1997–1998:

- (i) Batch number assigned to the batch under § 80.65(d) or § 80.101(i);
- (ii) Volume; and
- (iii) Sulfur content.

(3) For any refiner who acquires a refinery after January 1, 1999, or reactivates a refinery that was shut down or non-operational between January 1, 1998, and January 1, 1999, the average sulfur level and average volume of gasoline produced during each year the refinery was in operation after the refinery was acquired or reactivated. Where appropriate, the baseline sulfur level and volume for such refineries will be determined based on the annual average for the most recent year of operation.

(b) The sulfur baseline application must be submitted to the address specified in § 80.235(b).

§ 80.250 How is the small refiner sulfur baseline and volume determined?

(a)(1) The small refiner baseline volume is determined for each refinery as follows:

$$V_b = \frac{\sum_{i=1}^n (V_i)}{2}$$

Where:

V_b = Baseline volume.

V_i = Volume of gasoline batch i .

n = Total number of batches of gasoline produced from January 1, 1997, through December 31, 1998.

i = Individual batch of gasoline produced from January 1, 1997, through December 31, 1998.

(2) The small refiner sulfur baseline is determined for each refinery as follows:

$$S_b = \frac{\sum_{i=1}^n (V_i \times S_i)}{\sum_{i=1}^n V_i}$$

Where:

S_b = Small refiner sulfur baseline.

V_i = Volume of gasoline batch i .

S_i = Sulfur content of batch i .

n = Total number of batches of gasoline produced from January 1, 1997, through December 31, 1998.

i = Individual batch of gasoline produced from January 1, 1997, through December 31, 1998.

(b) Foreign refineries who do not have an approved refinery baseline under

§ 80.94 must follow the procedures specified in § 80.410(b).

(c) If at any time a small refinery baseline is determined to be incorrect, the corrected baseline applies ab initio and the annual average standards and cap standards are deemed to be those applicable under the corrected information.

§ 80.255 Compliance plans and demonstration of commitment to produce low sulfur gasoline.

The requirements of this section apply to any refiner approved for small refiner standards who wishes to be eligible for a hardship extension under § 80.260.

(a) *Compliance commitment.* By no later than June 1, 2004, any refiner who is approved for small refinery standards must submit a preliminary report to EPA which outlines the refiner's timeline for compliance and a project plan which discusses permits, capital commitments and engineering plans for making the necessary modifications to produce gasoline that meets the 30 ppm refinery average and 80 ppm per-gallon cap sulfur standards under § 80.195 on or before January 1, 2008. Documents showing activities and progress in these areas should be provided, if available.

(b) *Demonstration of Progress.* (1)(i) By no later than June 1, 2005, the small refiner must submit a report to EPA that states in detail the progress toward compliance with the 30 ppm refinery average and 80 ppm cap sulfur standards to date based on their timeline and project plan. The report must include:

(A) Copies of approved permits for construction of the equipment, or the permit application if approval is still pending;

(B) Copies of contracts for design and construction; and

(C) Any available evidence of having secured the necessary financing to complete the required construction;

(ii) If the refiner anticipates any difficulties in meeting its compliance commitments under this section, the refiner must submit a detailed report of all efforts made to date and the factors that may cause delay, including costs, specification of engineering or other design work needed and reasons for delay, specification of equipment needed and any reasons for delay, potential equipment suppliers and history of negotiations, and any other relevant information. If unavailability of equipment is a factor, the report must include a discussion of other options considered and the reasons these other options are not feasible.

(2) By no later than June 1, 2006, the small refiner must submit to EPA evidence that on-site construction has begun and that, absent unforeseen difficulties, the small refiner will be producing complying gasoline by January 1, 2008. If construction has not begun, the refiner must demonstrate that it has made all reasonable efforts to begin construction, that substantial progress is being made to begin construction as soon as possible, and that construction can be completed in time to begin production of gasoline that complies with the standards of § 80.195 by January 1, 2008.

(c) *Additional information.* The Administrator may request any additional information necessary to determine a refiner's commitment and/or progress toward meeting the standards in § 80.195 by 2008.

(d) *Failure to comply with requirements.* Any small refiner who fails to submit the progress reports required under this section will not be eligible for a hardship extension under § 80.260.

§ 80.260 What are the procedures and requirements for obtaining a hardship extension?

(a) An approved small refiner who has filed the reports specified in § 80.255 may apply to EPA for a hardship extension of the small refiner standards for calendar years 2008 and 2009. The application must be submitted in writing no later than January 1, 2007, to U.S. EPA, Attn: Sulfur Program (6406J), 401 M Street, SW, Washington, DC 20460. For commercial (non-postal) delivery: U.S. EPA, Attn: Sulfur Program, 501 3rd Street NW, Washington, DC 20001.

(b) The application must specify the factors that demonstrate a significant economic hardship and must provide a detailed discussion regarding the inability of the refinery to produce gasoline meeting the requirements of § 80.195. Such an application must include, at a minimum, the following information:

(1) Documentation of efforts made to obtain necessary financing, including:

(i) Copies of loan applications for the necessary financing of the construction of appropriate sulfur reduction technology and other equipment procurements or improvements; and

(ii) If financing has been disapproved or is otherwise unsuccessful, documents supporting the basis for that disapproval and evidence of efforts to pursue other means of financing;

(2) A detailed analysis of the reasons the refinery is unable to produce gasoline meeting the standards of

§ 80.195 in 2008, including costs, specification of equipment still needed, potential equipment suppliers, and efforts already completed to obtain the necessary equipment;

(3) If unavailability of equipment is part of the reason for the inability to comply, a discussion of other options considered, and the reasons these other options are not feasible;

(4) If relevant, a demonstration that a needed or lower cost technology is immediately unavailable, but will be available in the near future, and full information regarding when and from what sources it will be available;

(5) Schematic drawings of the refinery configuration as of January 1, 1999, and as of the date of the hardship extension application, and any planned future additions or changes;

(6) If relevant, a demonstration that a temporary unavailability exists of engineering or construction resources necessary for design or installation of the needed equipment;

(7) If sources of crude oil lower in sulfur than what the refiner is currently using are available, full information regarding the availability of these different crude sources, the sulfur content of those crude sources, the cost of the different crude sources over the past five years, and an estimate of gasoline sulfur levels achievable by the refinery if the lower sulfur crude sources were used;

(8) A discussion of any sulfur reductions that can be achieved from current levels;

(9) The date the refiner anticipates compliance with the standards in § 80.195 can be achieved at its refinery;

(10) An analysis of the economic impact of compliance on the refiner's business (including financial statements from the last 5 years, or for any time period up to 10 years, at EPA's request); and

(11) Any other information regarding other strategies considered, including strategies or components of strategies that do not involve installation of equipment, and why meeting the standards in § 80.195 beginning in 2008 is infeasible.

(c) The hardship extension application must contain a letter signed by the president or the chief operating or chief executive officer of the company, or his/her designee, stating that the information contained in the application is true to the best of his/her knowledge.

§ 80.265 How will the EPA approve or disapprove a hardship extension application?

(a) EPA will evaluate each application for hardship extension on a case-by-case

basis. The factors considered for a hardship extension may include: The refiner's financial position and efforts to obtain capital funding; the refiner's efforts to procure necessary equipment, obtain design and engineering services and construction contractors; the availability of desulfurization equipment; and any other relevant factor. An extension will be granted for a refinery for the 2008 averaging period if the small refiner who owns the refinery adequately demonstrates that severe economic hardship would result if compliance with the standards in § 80.195 is required in 2008, or that compliance with the standard in 2008 is not feasible for reasons beyond the refiner's control, and that the refiner has made the best efforts possible to achieve compliance with the national standards by January 1, 2008. Upon reapplication by the refiner, if EPA determines that further relief is appropriate, EPA may grant a further extension through the 2009 averaging period. In no case will a further extension for the 2009 averaging period be granted unless the refiner demonstrates conclusively that it has financing in place and that it will be able to complete construction and meet the national gasoline sulfur standards no later than December 31, 2009.

(b) EPA may request more information, if necessary, for evaluation of the application. If requested information is not submitted within the time specified in EPA's request, or any extensions granted, the application may be denied.

(c) EPA will notify the refiner of approval or disapproval of hardship extension by letter.

(1) If approved, EPA will also notify the refiner of the date that full compliance with the standards specified at § 80.195 must be achieved or what interim sulfur levels or schedules apply, if any.

(2) If disapproved, beginning January 1, 2008, the refinery is subject to the requirements in § 80.195. Refiners who receive an extension for the 2008 averaging period shall meet the standards in § 80.195 beginning on January 1, 2009, unless EPA grants an extension of the hardship relief for an additional year. If such an additional extension is granted, the refiner shall meet the standards in § 80.195 on January 1, 2010.

(d) Refiners who receive a hardship extension may be required to meet more stringent standards than those which apply to them during 2007, and/or could be required to offset excess sulfur levels. EPA may impose reasonable conditions on an extension, such as

requiring segregation of the small refiner's gasoline or requiring the gasoline to be sold for use in older vehicles only.

§ 80.270 Can a refiner seek temporary relief from the requirements of this subpart?

(a) EPA may permit a refiner to produce and distribute gasoline which does not meet the requirements of this subpart if the refiner demonstrates that:

(1) Unusual circumstances exist that impose extreme hardship and significantly affect ability to comply by the applicable date; and

(2) It has made best efforts to comply with the requirements of this subpart (including making efforts to obtain credits and/or allotments).

(b) Applications must be submitted to EPA by September 1, 2000. Relief may be granted from some or all of the requirements of this subpart, at EPA's discretion; however, EPA reserves the right to deny applications for appropriate reasons, including unacceptable environmental impact. Approval to distribute gasoline which does not meet the requirements of this subpart may be granted for such time period as EPA determines is appropriate, but shall not extend beyond January 1, 2008.

(c)(1) Applications must include a plan demonstrating how the refiner will comply with the requirements of this subpart as expeditiously as possible. The plan shall include a showing that contracts are or will be in place for engineering and construction of desulfurization equipment, a plan for applying for and obtaining any permits necessary for construction, a description of plans to obtain necessary capital, and a detailed estimate of when the requirements of this subpart will be met.

(2) Applications must include a detailed description of the refinery configuration and operations, including, at a minimum, the following information:

(i) The portion of gasoline production that is produced using an FCC unit;

(ii) The refinery's hydrotreating capacity;

(iii) The refinery's total reformer unit throughput capacity;

(iv) The refinery's total crude capacity;

(v) Total crude capacity of any other refineries owned by the same entity;

(vi) Total volume of gasoline production at the refinery;

(vii) Total volume of other refinery products; and

(viii) Geographic location(s) in which gasoline will be sold.

(3) Applications must include, at a minimum, the following information:

(i) Detailed description of efforts to obtain capital for refinery investments;
(ii) Bond rating of entity that owns the refinery; and

(iii) Estimated capital investment needed to comply with the requirements of this subpart by the applicable date.

(4) Applicants must also provide any other relevant information requested by EPA.

(d) EPA may impose any reasonable conditions on waivers granted under this section.

Allotment Trading Program

§ 80.275 How are allotments generated and used?

(a) *Generation of allotments and credits in 2003.* (1) During 2003 only, any domestic or foreign refiner may have the option to generate credits in accordance with the provisions of § 80.305 or generate allotments and credits under paragraph (a)(2) of this section.

(2) If the average sulfur content of the gasoline produced at a refinery is less than the refinery's baseline as determined under § 80.295 and is 60 ppm or less, allotments and credits may be generated using the following procedures. This paragraph (a) does not apply to importers.

(i) If the average sulfur content of the gasoline produced at a refinery is less than or equal to 30, and the refinery's sulfur baseline is greater than 120, the following procedures apply:

$$SA_{\text{TypeB}} = (30 - S_a) \times V$$

$$SA_{\text{TypeA}} = (V \times 90) \times 0.8$$

$$CR = (S_{\text{Base}} - 120) \times V$$

(ii) If the average sulfur content of the gasoline produced at a refinery is less than or equal to 30, and the refinery's sulfur baseline is greater than 30 but less than or equal to 120, the following procedures apply:

$$SA_{\text{TypeB}} = (30 - S_a) \times V$$

$$SA_{\text{TypeA}} = ((S_{\text{Base}} - 30) \times V) \times 0.8$$

(iii) If the average sulfur content of the gasoline produced at a refinery is less than or equal to 30, and the refinery's sulfur baseline is less than or equal to 30, the following procedures apply:

$$SA_{\text{TypeB}} = (S_{\text{Base}} - S_a) \times V$$

(iv) If the average sulfur content of the gasoline produced at a refinery is greater than 30, and the refinery's sulfur baseline is greater than 120, the following procedures apply:

$$SA_{\text{TypeA}} = ((120 - S_a) \times V) \times 0.8$$

$$CR = (S_{\text{Base}} - 120) \times V$$

(v) If the average sulfur content of the gasoline produced at a refinery is greater than 30, and the refinery's sulfur baseline is less than or equal to 120, the following procedures apply:

$$SA_{\text{TypeA}} = ((S_{\text{Base}} - S_a) \times V) \times 0.8$$

(vi) For purposes of the equations under paragraphs (a)(2)(i) through (v) of this section, the following definitions apply:

SA_{TypeB} = Type B sulfur allotments generated.

SA_{TypeA} = Type A sulfur allotments generated.

CR = Credits generated.

S_{Base} = Refinery's sulfur baseline value under § 80.295.

S_a = Average sulfur content of the gasoline produced at the refinery during 2003 (or for a foreign refinery, all gasoline produced during 2003 that was imported into the U.S.).

V = Volume of gasoline produced at the refinery during 2003 (or for a foreign refinery, all gasoline produced during 2003 that was imported into the U.S.).

(b) *Generation of allotments in 2004 and 2005.* During 2004 and 2005 only, refiners and importers that have corporate pool average sulfur levels below the corporate pool average standards under § 80.195 may generate sulfur allotments separately for each year using the following procedures.

(1) If the average sulfur content of the gasoline produced or imported is less than 30 the following procedures apply:

$$SA_{\text{TypeB}} = (30 - S_a) \times V_a$$

$$SA_{\text{TypeA}} = (S_{\text{PS}} - 30) \times V_a$$

(2) If the average sulfur content of the gasoline produced or imported is equal to or greater than 30 the following procedures apply:

$$SA_{\text{TypeA}} = (S_{\text{PS}} - S_a) \times V_a$$

(3) For purposes of the equations under paragraphs (b)(1) and (2) of this section, the following definitions apply:

SA_{TypeB} = Type B sulfur allotments generated.

SA_{TypeA} = Type A sulfur allotments generated.

S_a = Corporate pool average sulfur level for the year.

S_{PS} = Corporate pool average standard (120 in 2004; 90 in 2005).

V_a = Total volume of gasoline produced and/or imported during the year.

(c) *Use of sulfur allotments to meet standards.* (1) Refiners and importers may use Type A and Type B sulfur allotments to meet the corporate pool average standards under § 80.195, except that if allotments generated in 2003 or 2004 are used to meet the corporate pool standard in 2005 the allotments generated in 2003 or 2004 shall be reduced in value by 50%.

(2) Small refiners subject to the standards under § 80.240, and refiners and importers of gasoline designated as

GPA gasoline under § 80.219(a), may use sulfur allotments to meet their annual average refinery or importer standards.

(d) *Transfers of sulfur allotments.* Sulfur allotments generated under this section may be transferred, provided that:

(1) No allotment may be transferred more than twice: The first transfer by the refiner or importer who generated the allotment may only be made to a refiner or importer who intends to use the allotment; if the transferee cannot use the allotment, it may make the second, and final, transfer only to a refiner or importer who intends to use the allotment. In no case may an allotment be transferred more than twice before being used or terminated.

(2) The allotment transferor must apply any allotments necessary to meet the transferor's corporate pool average standard before transferring allotments to any other refiner or importer or before converting allotments into credits.

(3) The transferor must supply to the transferee records indicating the year of generation and type of the allotments, the identity of the refiner or importer who generated the allotments, and the identity of the transferring party, if it is not the same part that generated the allotments.

(4) The transferor must inform the transferee whether any transferred allotments are Type A allotments or Type B allotments, as defined in paragraphs (a) and (b) of this section.

(5) In the case of allotments that have been calculated or created improperly, or are otherwise determined to be invalid, the following provisions apply:

(i) Invalid allotments cannot be used to achieve compliance with the transferee's corporate pool average standard or be converted to credits, regardless of the transferee's good faith belief that the allotments were valid.

(ii) The refiner or importer who used the allotments, and any transferor of the allotments, must adjust their allotment records and reports and sulfur calculations as necessary to reflect the proper allotments.

(iii) Any allotments remaining after correcting for the improperly created allotments must first be applied to correct the invalid transfers before the transferor may transfer any other allotments or before converting allotments into credits.

(e) *Conversion of allotments into credits.* A refiner or importer may convert allotments into credits using the following procedures:

(1) Type A allotments may be converted into credits with the same requirements and limitations on use that

apply under § 80.315 to credits generated in 2000 through 2003.

(2) Type B allotments may be converted into credits with the same requirements and limitations on use that apply under § 80.315 to credits generated in 2004 and later, based on the year of creation of the allotment.

(f) *Small refiners.* Small refiners subject to the standards under § 80.240 may not generate sulfur allotments under paragraph (b) of this section.

(g) *GPA gasoline.* GPA gasoline that is included in the refiner's or importer's corporate pool average under § 80.216(f)(2) must be included in the calculations under paragraph (b) of this section. No refiner or importer may generate allotments in 2004 or 2005 who is not required to meet the corporate pool average standards.

Averaging, Banking and Trading (ABT) Program—General Information

§ 80.280 [Reserved]

§ 80.285 Who may generate credits under the ABT program?

(a) *Credit generation in 2000 through 2003.* (1) Credits may be generated in 2000 through 2003 under § 80.305 by refiners who produce gasoline from crude oil, and are:

(i) Refiners who establish a sulfur baseline under § 80.295;

(ii) Foreign refiners with approved baselines under § 80.94, or baselines established in accordance with § 80.410; or

(iii) Small refiners for any refinery subject to the standards under § 80.240, using their small refiner baseline established under § 80.250.

(2) Importers and oxygenate blenders may not generate credits under § 80.305.

(b) *Credit generation beginning in 2004.* (1) Credits may be generated beginning in 2004 under § 80.310 by:

(i) Refiners and importers subject to the standards under § 80.195;

(ii) Refiners and importers of gasoline designated as GPA gasoline under § 80.219, using the lesser of: 150 ppm; or the refiner's or importer's baseline calculated under § 80.295; or the refinery's lowest annual average sulfur content for any year from 2000 through 2003 during which the refiner generated credits (for any party generating credits under both paragraph (b)(1)(i) of this section and this paragraph (b)(1)(ii), such credits must be calculated separately); or

(iii) Small refiners for any refinery subject to the standards under § 80.240, using refinery's standard established under § 80.240.

(2) Generation of credits for all imported gasoline shall be through the importer.

(3) Oxygenate blenders may not generate credits under § 80.310.

§ 80.290 How does a refiner apply for a sulfur baseline?

(a) The refiner must submit an application to EPA which includes the information required under paragraph (c) of this section no later than September 30 of the year in which the refiner plans to begin generating credits, or the refiner or an importer plans to sell gasoline in the geographic phase-in area in accordance with § 80.217.

(b) The sulfur baseline request must be sent to: U.S. EPA, Attn: Sulfur Program (6406J), 401 M Street SW., Washington, DC 20460. For commercial (non-postal) delivery: U.S. EPA, Attn: Sulfur Program, 501 3rd Street NW., Washington, DC 20001.

(c) The sulfur baseline application must include the following information:

(1) A listing of the names and addresses of all refineries owned by the corporation for which the refiner is applying for a sulfur baseline.

(2) The annual average gasoline sulfur baseline for gasoline produced in 1997–1998, for each refinery for which the refiner is applying for a sulfur baseline, calculated in accordance with § 80.295.

(3) A letter signed by the president, chief operating or chief executive officer, of the company, or his/her delegate, stating that the information contained in the sulfur baseline determination is true to the best of his/her knowledge.

(4) Name, address, phone number, facsimile number and E-mail address of a corporate contact person.

(5) The following information for each batch of gasoline produced in 1997–1998:

(i) Batch number assigned to the batch under § 80.65(d) or § 80.101(i);

(ii) Volume; and

(iii) Sulfur content.

(d) Foreign refiners who do not have an approved refinery baseline under § 80.94 must follow the procedures specified in § 80.410(b).

(e) Within 60 days of receipt of an application under this section, EPA will notify the refiner of approval of the refinery's baseline or of any deficiencies in the application.

(f) If at any time the baseline submitted in accordance with the requirements of this section is determined to be incorrect, EPA will notify the refiner of the corrected baseline.

(g) Any refiner that seeks temporary relief under § 80.270 shall apply for a refinery sulfur baseline in accordance with the provisions of this section and § 80.295, and if applicable, § 80.410(b), no later than September 1, 2000.

ABT Program—Baseline Determination

§ 80.295 How is a refinery sulfur baseline determined?

(a) A refinery's gasoline sulfur baseline for the purpose of generating credits during years 2000 through 2003 is calculated using the following equation:

$$S_{\text{Base}} = \frac{\sum_{i=1}^n (V_i \times S_i)}{\sum_{i=1}^n V_i}$$

Where:

S_{Base} = Sulfur baseline value.

V_i = Volume of gasoline batch i .

S_i = Sulfur content of gasoline batch i .

n = Total number of batches of gasoline produced during January 1, 1997 through December 31, 1998.

i = Individual batch of gasoline produced during January 1, 1997 through December 31, 1998.

(b) Any refiner who, under § 80.65 or § 80.101(d)(4), included oxygenate blended downstream in compliance calculations for 1997–1998 must include this oxygenate in the baseline calculations for sulfur content under paragraph (a) of this section.

§ 80.300 [Reserved]

ABT Program—Credit Generation

§ 80.305 How are credits generated during the time period 2000 through 2003?

(a) Credits must be calculated as follows:

$$CR_a = V_a \times (S_{\text{Base}} - S_a)$$

Where:

CR_a = Credits generated for the averaging period.

V_a = Total volume of gasoline produced during the averaging period at the refinery.

S_{Base} = Sulfur baseline value for the refinery established under § 80.250 or § 80.295.

S_a = Actual annual average sulfur level for gasoline produced during the averaging period by the refinery exclusive of any credits.

(b) The refiner may include any oxygenates included in its RFG or conventional gasoline volume under §§ 80.65 and 80.101(d)(4), respectively, for the purpose of generating credits.

(c) Credits under this program are in units of "ppm-gallons".

(d) Refiners may generate credits for gasoline produced during an averaging period only if the annual average sulfur level for the gasoline produced during the averaging period is less than 0.90 of the refiners baseline under § 80.250 or § 80.295.

(e) Credits generated in accordance with paragraph (a) of this section must be identified by the year of creation.

§ 80.310 How are credits generated beginning in 2004?

(a) A refiner for any refinery, or an importer, may generate credits in 2004 and thereafter if the annual average sulfur level for gasoline produced or imported for the averaging period is less than the applicable refinery or importer annual average sulfur standard for that refinery or importer in that year.

(b) Credits are calculated as follows:

$$CR_a = V_a \times (S_{std} - S_a)$$

Where:

CR_a = Credits generated for the averaging period.

V_a = Total annual volume gasoline produced at a refinery or imported during the averaging period.

S_{std} = 30 ppm; or the sulfur standard for a small refinery established under § 80.240; or, for gasoline designated as GPA gasoline under § 80.219, the lesser of 150 ppm, the refinery's or importer's baseline calculated under § 80.295, or the refinery's lowest annual average sulfur content for any year from 2000 through 2003 during which the refinery generated credits or allotments.

S_a = Actual annual average sulfur level of gasoline produced at a refinery or imported during the averaging period exclusive of any credits.

(c) Credits generated in accordance with this section must be identified by the year of creation.

ABT Program—Credit Use

§ 80.315 How are credits used and what are the limitations on credit use?

(a) *Credit use.* Credits may be used to meet the applicable refinery or importer annual average sulfur standards under § 80.195, § 80.216, or § 80.240, provided that:

(1) Sulfur credits used were generated pursuant to the requirements of this subpart; and

(2) The requirements of paragraphs (b) and (c) of this section are met.

(b) *Credit transfers.* (1) Credits obtained from other persons may be used to meet the annual average standards specified in § 80.195, § 80.216, or § 80.240 if all the following conditions are met:

(i) The credits are generated and reported according to the requirements of this subpart.

(ii) The credits are used in compliance with the limitations regarding the appropriate periods for credit use in this subpart.

(iii) Any credit transfer takes place no later than the last day of February following the calendar year averaging period when the credits are used.

(iv) No credit may be transferred more than twice: The first transfer by the refiner or importer who generated the credit may only be made to a refiner or importer who intends to use the credit; if the transferee cannot use the credit, it may make the second, and final, transfer only to a refiner or importer who intends to use the credit. In no case may a credit be transferred more than twice before being used or terminated.

(v) The credit transferor must apply any credits necessary to meet the transferor's applicable average standard before transferring credits to any other refiner or importer.

(vi) No credits may be transferred that would result in the transferor having a negative credit balance.

(vii) Each transferor must supply to the transferee records indicating the years the credits were generated, the identity of the refiner or importer who generated the credits, and the identity of the transferring party, if it is not the same party that generated the credits.

(2) In the case of credits that have been calculated or created improperly, or are otherwise determined to be invalid, the following provisions apply:

(i) Where a refiner's baseline has been determined to be incorrect under § 80.250(c) or § 80.290(f), any credits generated, banked, used or traded must be adjusted to reflect the corrected baseline.

(ii) Invalid credits cannot be used to achieve compliance with the transferee's averaging standard, regardless of the transferee's good faith belief that the credits were valid.

(iii) The refiner or importer who used the credits, and any transferor of the credits, must adjust their credit records and reports and sulfur calculations as necessary to reflect the proper credits.

(iv) Any properly created credits existing in the transferor's credit balance after correcting the credit balance, and after the transferor applies credits as needed to meet the average standard at the end of the compliance year, must first be applied to correct the invalid transfers before the transferor trades or banks the credits.

(c) *Limitations on credit use.* (1) Credits generated prior to 2004 may only be used for demonstrating compliance with the refinery or importer annual average standards under § 80.195 during the 2005 and 2006 averaging periods. Such credits may be used to demonstrate compliance with the standards under § 80.216 during the 2004 through 2006 averaging

periods, and with the standards under § 80.240 during the 2004 through 2007 averaging periods, and the 2008 and 2009 averaging periods, if allowed under the terms of a hardship extension under § 80.265.

(2) Credits generated in 2004 or later may only be used for demonstrating compliance with standards during an averaging period within five years of the year of generation.

(3) A refiner or importer possessing credits must use all credits prior to falling into compliance deficit under § 80.205(e).

(4) Credits may not be used to meet corporate pool average standards under § 80.195.

§ 80.320 [Reserved]

§ 80.325 [Reserved]

Sampling, Testing and Retention Requirements for Refiners and Importers

§ 80.330 What are the sampling and testing requirements for refiners and importers?

(a) *Sample and test each batch of gasoline.* (1) Refiners and importers shall collect a representative sample from each batch of gasoline produced or imported and test each sample to determine its sulfur content for compliance with requirements under this subpart prior to the gasoline leaving the refinery or import facility, using the sampling and testing methods provided in this section.

(2) Except as provided in paragraph (a)(3) of this section, the requirements of this section apply beginning January 1, 2004, or January 1 of the first year of allotment or credit generation under § 80.275 or § 80.305, whichever is earlier.

(3) Prior to January 1, 2004, for purposes of meeting the sampling and testing requirements of this section for conventional gasoline, any refiner may, prior to analysis, combine samples of gasoline from more than one batch of gasoline or blendstock and treat such composite sample as one batch of gasoline or blendstock pursuant to the requirements of § 80.101(i)(2).

(4) Any refiner who produces reformulated gasoline or conventional gasoline using computer-controlled inline blending equipment may meet the testing requirement of paragraph (a)(1) of this section under the terms of an exemption granted under § 80.65(f)(4).

(b) *Sampling methods.* For purposes of paragraph (a) of this section, refiners and importers shall sample each batch of gasoline by using one of the following methods:

(1) Manual sampling of tanks and pipelines shall be performed according to the applicable procedures specified in one of the two following methods:

(i) American Society for Testing and Materials (ASTM) method D 4057-95, entitled "Standard Practice for Manual Sampling of Petroleum and Petroleum Products."

(ii) Samples collected under the applicable procedures in ASTM method D 5842-95, entitled "Standard Practice for Sampling and Handling of Fuels for Volatility Measurement," may be used for measuring sulfur content if there is no contamination present that could affect the sulfur test result.

(2) Automatic sampling of petroleum products in pipelines shall be performed according to the applicable procedures specified in ASTM method D 4177-95, entitled "Standard Practice for Automatic Sampling of Petroleum and Petroleum Products."

(c) *Test method for measuring the sulfur content of gasoline.* (1) For purposes of paragraph (a) of this section, refiners and importers shall use the method provided in § 80.46(a)(1) to measure the sulfur content of gasoline they produce or import.

(2) Except as provided in § 80.350 and in paragraph (c)(1) of this section, any ASTM sulfur test method for liquefied fuels may be used for quality assurance testing under § 80.400, or to determine whether gasoline qualifies for a S-RGAS downstream standard, if the protocols of the ASTM method are followed and the alternative method is correlated to the method provided in § 80.46(a)(1).

(d) *Test method for sulfur in butane.* (1) Refiners and importers shall use the method provided in § 80.46(a)(2) to measure the sulfur content of butane when the butane constitutes a batch of gasoline.

(2) Except as provided in paragraph (d)(1) of this section, any ASTM sulfur test method for gaseous fuels may be used for quality assurance testing under §§ 80.340(b)(4) and 80.400, if the protocols of the ASTM method are followed and the alternative method is correlated to the method provided in § 80.46(a)(2).

(e) *Incorporations by reference.* ASTM standard practices D 4057-95, D 4177-95 and D 5842-95 are incorporated by reference. These incorporations by reference were approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the American Society for Testing and Materials, 100 Barr Harbor Dr., West Conshohocken, PA 19428. Copies may be inspected at the Air Docket Section (LE-131), room M-1500, U.S.

Environmental Protection Agency, Docket No. A-97-03, 401 M Street, SW., Washington, DC 20460, or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

§ 80.335 What gasoline sample retention requirements apply to refiners and importers?

(a) *Sample retention requirements.* Beginning January 1, 2004, or January 1 of the first year allotments or credits are generated under §§ 80.275 and 80.305, whichever is earlier, any refiner or importer shall:

(1) Collect a representative portion of each sample analyzed under § 80.330(a), of at least 330 ml in volume;

(2) Retain sample portions for the most recent 20 samples collected, or for each sample collected during the most recent 21 day period, whichever is greater;

(3) Comply with the gasoline sample handling and storage procedures under § 80.330(b) for each sample portion retained; and

(4) Comply with any request by EPA to:

(i) Provide a retained sample portion to the Administrator's authorized representative; and

(ii) Ship a retained sample portion to EPA, within 2 working days of the date of the request, by an overnight shipping service or comparable means, to the address and following procedures specified by EPA, and accompanied with the sulfur test result for the sample determined under § 80.330(a).

(b) *Sample retention requirement for samples subject to independent analysis requirements.* (1) Any refiner or importer who meets the independent analysis requirements under § 80.65(f) for any batch of reformulated gasoline or RBOB will have met the requirements of paragraph (a) of this section, provided the independent laboratory meets the requirements of paragraph (a) of this section for the gasoline batch.

(2) For samples retained by an independent laboratory under paragraph (b) of this section, the test results required to be submitted under paragraph (a) of this section shall be the test results determined under § 80.65(e).

(c) *Sampling compliance certification.* Any refiner or importer shall include with each annual report filed under § 80.370, the following statement, which must accurately reflect the facts and must be signed and dated by the same person who signs the annual report:

I certify that I have made inquiries that are sufficient to give me knowledge of the procedures to collect and store gasoline samples, and I further certify that the

procedures meet the requirements of the ASTM procedures required under 40 CFR 80.330.

§ 80.340 What standards and requirements apply to refiners producing gasoline by blending blendstocks into previously certified gasoline (PCG)?

(a) Any refiner who produces gasoline by blending blendstock into PCG must meet the requirements of § 80.330 to sample and test every batch of gasoline as follows:

(1)(i) Sample and test to determine the volume and sulfur content of the PCG prior to blendstock blending.

(ii) Sample and test to determine the volume and sulfur content of the gasoline subsequent to blendstock blending.

(iii) Calculate the volume and sulfur content of the blendstock, by subtracting the volume and sulfur content of the PCG from the volume and sulfur content of the gasoline subsequent to blendstock blending. The blendstock is a batch for purposes of compliance calculations and reporting. For purposes of this paragraph (a), compliance with the applicable cap standard under § 80.195(a) shall be determined based on the sulfur content of the gasoline subsequent to blendstock blending.

(2) In the alternative, a refiner may sample and test each batch of blendstock when received at the refinery to determine the volume and sulfur content, and treat each blendstock receipt as a separate batch for purposes of compliance calculations for the annual average sulfur standard and for reporting. This alternative applies only if every batch of blendstock used at a refinery during an averaging period has a sulfur content that is equal to, or less than, the applicable per-gallon cap standard under §§ 80.195 or 80.216.

(b) Refiners who blend only butane into PCG may meet the sampling and testing requirements by using sulfur test results of the butane supplier, provided that the following requirements are also met:

(1) The sulfur content of the butane received from the butane supplier must not exceed the following sulfur standards on a per-gallon basis as follows:

(i) 120 ppm in 2004, and 30 ppm for 2005 and any subsequent year;

(ii) Except that the per-gallon sulfur content of butane blended to PCG that is designated as GPA gasoline shall not exceed 150 ppm from January 1, 2004, through December 31, 2006.

(2) The refiner obtains test results from the butane supplier that demonstrate that the sulfur content of

each load of butane supplied does not exceed the applicable per-gallon sulfur standard under paragraph (b)(1) of this section through test results of samples of the butane contained in the storage tank from which the butane blender is supplied.

(i) Testing for the sulfur content of the butane by the supplier must be subsequent to each receipt of butane into the supplier's storage tank, or the testing must be immediately before transfer of butane to the butane blender.

(ii) The testing must be performed by the method specified in § 80.46(a)(2).

(iii) The butane blender must obtain a copy of the butane supplier's test results, at the time of each transfer of butane to the butane blender, that reflect the sulfur content of each load of butane supplied to the butane blender.

(3) The sulfur content and volume of each batch of gasoline produced is that of the butane the refiner blends into gasoline for purposes of calculating compliance with the standards in §§ 80.195 and 80.216.

(4) The refiner must conduct a quality assurance program of sampling and testing for each butane supplier that demonstrates the butane sulfur content does not exceed the applicable per-gallon sulfur standard in paragraph (b)(1) of this section. The frequency of butane sampling and testing, for each butane supplier, must be one sample for every 500,000 gallons of butane received, or one sample every 3 months, whichever results in more frequent sampling.

(5) If any of the requirements of this section are not met, in whole or in part, for any butane blended into gasoline, that butane is deemed in violation of the gasoline sulfur standards in § 80.195 or § 80.216, as applicable.

§ 80.345 [Reserved]

§ 80.350 What alternative sulfur standards and requirements apply to importers who transport gasoline by truck?

Importers who import gasoline into the United States by truck may comply with the following requirements instead of the requirements to sample and test every batch of gasoline under § 80.330, and the annual sulfur average and per-gallon cap standards otherwise applicable to importers under §§ 80.195 and 80.216:

(a) *Alternative standards.* The imported gasoline must comply with the standards in paragraph (a)(1) or (a)(2) of this section as follows:

(1) The applicable average standards, corporate average standards and per-gallon standards under § 80.195(a)(1), except that imported gasoline

designated for use in the geographic phase-in area from January 1, 2004, through December 31, 2006 must comply with an average standard of 150 ppm and a per-gallon standard of 300 ppm; or

(2) In 2004, a per-gallon standard of 120 ppm, and in 2005 and subsequent years a per-gallon standard of 30 ppm, except that imported gasoline designated for use in the geographic phase-in area from January 1, 2004, through December 31, 2006 must comply with a per-gallon standard of 150 ppm.

(b) *Terminal testing.* The importer may use test results for sulfur content testing conducted by the terminal operator, for gasoline contained in the storage tank from which trucks used to transport gasoline into the United States are loaded, for purposes of demonstrating compliance with the standards in paragraph (a) of this section, provided the following conditions are met:

(1) The sampling and testing shall be performed after each receipt of gasoline into the storage tank, or immediately before each transfer of gasoline to the importer's truck.

(2) The sampling and testing shall be performed using the methods specified in § 80.330(b) and 80.46(a)(1), respectively.

(3) At the time of each transfer of gasoline to the importer's truck for import to the U.S., the importer must obtain a copy of the terminal test result that indicates the sulfur content of the truck load.

(c) *Quality assurance program.* The importer must conduct a quality assurance program, as specified in this paragraph, for each truck loading terminal.

(1) Quality assurance samples must be obtained from the truck-loading terminal and tested by the importer, or by an independent laboratory, and the terminal operator must not know in advance when samples are to be collected.

(2) The sampling and testing must be performed using the methods specified in §§ 80.330(b) and 80.46(a)(1), respectively.

(3) The quality assurance test results for sulfur must differ from the terminal test result by no more than the ASTM reproducibility of the terminal's test results, as determined by the following equation:

$$R = 105 \times ((S+2)/10^4)^{0.4}$$

Where:

R = ASTM reproducibility.

S = Sulfur content based on the terminal's test result.

(4) The frequency of the quality assurance sampling and testing must be at least one sample for each fifty of an importer's trucks that are loaded at a terminal, or one sample per month, whichever is more frequent.

(d) *Party required to conduct quality assurance testing.* The quality assurance program under paragraph (c) of this section shall be conducted by the importer. In the alternative, this testing may be conducted by an independent laboratory that meets the criteria under § 80.65(f)(2)(iii), provided the importer receives, no later than 21 days after the sample was taken, copies of all results of tests conducted.

(e) *Assignment of batch numbers.* The importer must treat each truck load of imported gasoline as a separate batch for purposes of assigning batch numbers and maintaining records under § 80.365, and reporting under § 80.370.

(f) *EPA inspections of terminals.* EPA inspectors or auditors, and auditors conducting attest engagements under § 80.415, must be given full and immediate access to the truck-loading terminal and any laboratory at which samples of gasoline collected at the terminal are analyzed, and must be allowed to conduct inspections, review records, collect gasoline samples, and perform audits. These inspections or audits may be either announced or unannounced.

(g) *Certified Sulfur-FRGAS.* This section does not apply to Certified Sulfur-FRGAS.

(h) *Reporting requirements.* Any importer who elects to comply with the alternative standards in paragraph (a) of this section shall comply with the following requirements:

(1) All importer recordkeeping and reporting requirements under §§ 80.365 and 80.370, except as provided in paragraph (h)(2) of this section.

(2) An importer who elects to comply with the alternative standards in paragraph (a)(2) of this section must certify in the annual report whether it is in compliance with the applicable per-gallon batch standard set forth in paragraph (a)(2) of this section, in lieu of providing the information required by § 80.370(a) regarding annual average sulfur content and compliance with the average standard under § 80.195.

(i) *Effect of noncompliance.* If any of the requirements of this section are not met, all gasoline imported by the truck importer during the time any requirements are not met is deemed in violation of the gasoline sulfur average and per-gallon cap standards in § 80.195 or § 80.216, as applicable. Additionally, if any requirement is not met, EPA may notify the importer of the violation and,

if the requirement is not fulfilled within 10 days of notification, the truck importer may not in the future use the sampling and testing provisions in this section in lieu of the provisions in § 80.330.

§ 80.355 [Reserved]

Recordkeeping and Reporting Requirements

§ 80.360 [Reserved]

§ 80.365 What records must be kept?

(a) *Records that must be kept.*

Beginning January 1, 2004, any person who produces, imports, sells, offers for sale, dispenses, distributes, supplies, offers for supply, stores, or transports gasoline, shall keep records that contain the following information:

(1) The product transfer document information required under §§ 80.77, 80.106, 80.210 and 80.219; and

(2) For any sampling and testing for sulfur content required under this subpart:

(i) The location, date, time and storage tank or truck identification for each sample collected;

(ii) The name and title of the person who collected the sample and the person who performed the test;

(iii) The results of the test as originally printed by the testing apparatus, or where no printed result is produced, the results as originally recorded by the person who performed the test; and

(iv) Any record that contains a test result for the sample that is not identical to the result recorded under paragraph (a)(2)(iii) of this section.

(b) *Additional records that refiners and importers must keep.* Beginning January 1, 2004, or January 1 of the first year allotments or credits are generated under § 80.275 or § 80.305, whichever is earlier, any refiner for each of its refineries, and any importer for the gasoline it imports, shall keep records that include the following information:

(1) For each batch of gasoline produced or imported:

(i) The batch volume;

(ii) The batch number assigned under § 80.65(d)(3) and the appropriate designation under paragraph (b)(1)(i) of this section; except that if composite samples of conventional gasoline representing multiple batches produced subsequent to December 31, 2003, are tested under § 80.101(i)(2) for anti-dumping compliance purposes, for purposes of this subpart a separate batch number must be assigned to each batch using the batch numbering procedures under § 80.65(d)(3);

(iii) The date of production or importation; and

(iv) If appropriate, the designation of the batch as GPA gasoline under § 80.219, California gasoline under § 80.375, exempt gasoline for research and development under § 80.380, or for export outside the United States.

(2) Information regarding credits and allotments, separately kept for credits and for allotments; separately kept according to the year of creation for the credits and for the allotments; and for credit generation or use starting in 2004, separately kept for GPA gasoline and other gasoline. Information shall be kept separately for different types of allotments and credits generated under §§ 80.275(e)(1), 80.275(e)(2), 80.305 and 80.310:

(i) The number in the refiner's or importer's possession at the beginning of the averaging period;

(ii) The number generated;

(iii) The number used;

(iv) If any were obtained from or transferred to other parties, for each other party its name, its EPA refiner or importer registration number, and the number obtained from, or transferred to, the other party;

(v) The number that expired at the end of the averaging period;

(vi) The number of allotments, by type, that were converted into credits under § 80.275(e);

(vii) The number in the refiner's or importer's possession that will carry over into the subsequent averaging period; and

(viii) Contracts or other commercial documents that establish each transfer of credits and allotments from the transferor to the transferee.

(3) The calculations used to determine the applicable refiner baseline under § 80.250 or § 80.295.

(4) The calculations used to determine compliance with the applicable sulfur average standards of § 80.195, § 80.216, § 80.240, or § 80.270.

(5) The calculations used to determine the number of credits or allotments generated under § 80.305, § 80.310 or § 80.275.

(6) The calculations used to determine any applicable adjusted cap standard under § 80.195(d).

(7) A copy of all reports submitted to EPA under § 80.370.

(c) *Additional records importers must keep.* Any importer shall keep records that identify and verify the source of each batch of certified Sulfur-FRGAS and non-certified Sulfur-FRGAS imported and demonstrate compliance with the requirements for importers under § 80.410(o).

(d) *Length of time records must be kept.* The records required in this section shall be kept for five years from the date they were created; except that:

(1) *Transfers of credits and allotments.* Records relating to credit and allotment transfers, except as provided in paragraph (d)(2) of this section, shall be kept by the transferor for 5 years from the date the credits or allotments are transferred, and shall be kept by the transferee for 5 years from the date the credits or allotments were transferred, used or terminated, whichever is later.

(2) *Early credits.* (i) Where the party generating the credits does not transfer the credits, records must be kept for 5 years from the date of creation, use or termination whichever is later.

(ii) Where early credits are transferred, records relating to such credits shall be kept by both parties for 5 years from the date the credits were transferred, used or terminated, whichever is later.

(e) *Make records available to EPA.* On request by EPA the records required in paragraphs (a), (b) and (c) of this section shall be provided to the Administrator's authorized representative. For records that are electronically generated or maintained the equipment and software necessary to read the records shall be made available, or if requested by EPA, electronic records shall be converted to paper documents which shall be provided to the Administrator's authorized representative.

§ 80.370 What are the sulfur reporting requirements?

Beginning with the 2004 averaging period, or the first year credits or allotments are generated under § 80.275 or § 80.305, whichever is earlier, and continuing for each averaging period thereafter, any refiner or importer shall submit to EPA annual reports that contain the information required in this section, and such other information as EPA may require.

(a) *Refiner and importer annual reports.* Any refiner, for each of its refineries, and any importer for the gasoline it imports, shall submit a report for each calendar year averaging period that includes the following information, and in the case of a refiner or importer producing or importing both GPA gasoline and other gasoline, the information shall be separately reported:

(1) The EPA importer, or refiner and refinery facility registration numbers;

(2) The applicable baseline, average standard, and adjusted cap standard as follows:

(i) For the years 2000 through 2003, the applicable baseline under § 80.250 or § 80.295.

(ii) For the 2004 averaging period and subsequent averaging periods:

(A) All applicable average standards under § 80.195, § 80.216, § 80.240 or § 80.270;

(B) All applicable adjusted cap standards under § 80.195(d), with the 2005 report identifying both the 2004 and 2005 applicable adjusted cap standards;

(3) The total volume of gasoline produced or imported;

(4) The annual average sulfur content of the gasoline produced or imported;

(5) The annual average sulfur level after inclusion of any credits and allotments;

(6) Information, separately provided, for credits and allotments, and separately by year of creation, as follows:

(i) The number of credits and allotments at the beginning of the averaging period;

(ii) The number of credits and allotments generated;

(iii) The number of credits and allotments used;

(iv) If any credits or allotments were obtained from or transferred to other parties, for each other party its name and EPA refiner or importer registration number, and the number of credits or allotments obtained from or transferred to the other party;

(v) The number of credits and allotments that expired at the end of the averaging period;

(vi) The number of credits and allotments that will carry over into the subsequent averaging period; and

(vii) The number of each type of allotments converted to credits;

(7) For each batch of gasoline produced or imported during the averaging period:

(i) The batch number assigned under § 80.65(d)(3) and the appropriate designation under § 80.365; except that if composite samples of conventional gasoline representing multiple batches produced subsequent to December 31, 2003, are tested under § 80.101(i)(2) for anti-dumping compliance purposes, for purposes of this subpart a separate batch number must be assigned to each batch using the batch numbering procedures under § 80.65(d)(3);

(ii) The date the batch was produced;

(iii) The volume of the batch; and

(iv) The sulfur content of the batch as determined under § 80.330; and

(8) When submitting reports under this paragraph (a), any importer shall exclude certified Sulfur-FRGAS.

(b) *Additional reporting requirements for importers.* Any importer shall report the following information for Sulfur-FRGAS imported during the averaging period:

(1) The EPA refiner and refinery registration numbers of each foreign

refiner and refinery where the certified Sulfur-FRGAS was produced; and

(2) The total gallons of certified Sulfur-FRGAS and non-certified Sulfur-FRGAS imported from each foreign refiner and refinery.

(c) *Corporate pool average reports.* (1) Annual reports filed under this section for the 2004 and 2005 averaging periods must include the party's corporate pool average as determined under § 80.205.

(2) If the party submitting the annual report under paragraph (c)(1) of this section is a refiner with more than one refinery or is a refiner who also imports gasoline, then for the purposes of this paragraph, the party shall report the information required for individual refineries and for importers under paragraph (a) of this section, also in the aggregate for all the gasoline produced and imported during the calendar year.

(3) Refiners and importers exempted from corporate pool standards under § 80.216 or § 80.240 are exempt from reporting the information required under paragraphs (c)(1) and (c)(2) of this section.

(d) *Report submission.* Any annual report required under this section shall be:

(1) Signed and certified as meeting all of the applicable requirements of this subpart by the owner or a responsible corporate officer of the refiner or importer; and

(2) Submitted to EPA no later than the last day of February for the prior calendar year averaging period.

(f) *Attest reports.* Attest reports for refiner and importer attest engagements required under § 80.415 shall be submitted to the Administrator by May 31 of each year for the prior calendar year averaging period.

§§ 80.371—80.373 [Reserved]

Exemptions

§ 80.374 What if a refiner or importer is unable to produce gasoline conforming to the requirements of this subpart?

In appropriate extreme and unusual circumstances (e.g., natural disaster or Act of God) which are clearly outside the control of the refiner or importer and which could not have been avoided by the exercise of prudence, diligence, and due care, EPA may permit a refiner or importer, for a brief period, to distribute gasoline which does not meet the requirements of this subpart provided the refiner or importer meets all the criteria, requirements and conditions contained in § 80.73 (a) through (e).

§ 80.375 What requirements apply to California gasoline?

(a) *Definition.* For purposes of this subpart *California gasoline* means any gasoline designated by the refiner as for use in California.

(b) *California gasoline exemption.* California gasoline that complies with all the requirements of this section is exempt from all other provisions of this subpart.

(c) *Requirements for California gasoline.* The requirements are:

(1) Each batch of California gasoline must be designated as such by its refiner or importer;

(2) Designated California gasoline must be kept segregated from gasoline that is not California gasoline, at all points in the distribution system;

(3) Designated California gasoline must ultimately be used in the State of California and not used elsewhere;

(4) In the case of California gasoline produced outside the State of California, the transferors and transferees must meet the product transfer document requirements under § 80.81(g); and

(5) Gasoline that is ultimately used in any part of the United States outside of the State of California must comply with the standards and requirements of this subpart, regardless of any designation as California gasoline.

(d) *Use of California test methods and off site sampling procedures.* In the case of any gasoline that is not California gasoline and that is either produced at a refinery located in the State of California or is imported from outside the United States into the State of California, the refiner or importer may, with regard to such gasoline:

(1) Use the sampling and testing methods approved in Title 13 of the California Code of Regulations instead of the sampling and testing methods required under § 80.330; and

(2) Determine the sulfur content of gasoline at off site tankage as permitted in § 80.81(h)(2).

§ 80.380 What are the requirements for obtaining an exemption for gasoline used for research, development or testing purposes?

Any person may request an exemption from the provisions of this subpart for gasoline used for research, development or testing ("R&D") purposes by submitting to EPA an application that includes all the information listed in paragraph (b) of this section.

(a) *Criteria for an R&D exemption.* For an R&D exemption to be granted, the proposed test program must:

(1) Have a purpose that constitutes an appropriate basis for exemption;

(2) Necessitate the granting of an exemption;

(3) Be reasonable in scope; and

(4) Have a degree of control consistent with the purpose of the program and EPA's monitoring requirements.

(b) *Information required to be submitted.* To demonstrate each of the four elements in paragraphs (a)(1) through (4) of this section, the application required under this section must include the following information:

(1) A statement of the purpose of the program demonstrating that the program has an appropriate R&D purpose.

(2) An explanation of why the stated purpose of the program cannot be achieved in a practicable manner without performing one or more of the prohibited acts under § 80.385.

(3) To demonstrate the reasonableness of the scope of the program:

(i) An estimate of the program's beginning and ending dates;

(ii) An estimate of the maximum number of vehicles and engines involved in the program, and the number of miles and engine hours that will be accumulated on each;

(iii) The sulfur content of the gasoline expected to be used in the program; and

(iv) The quantity of gasoline that exceeds the applicable sulfur standard that is expected to be used in the program.

(4) With regard to control, a demonstration that the program affords EPA a monitoring capability, including at a minimum:

(i) A description of the technical and operational aspects of the program;

(ii) The site(s) of the program (including street address, city, county, State, and ZIP code);

(iii) The manner in which information on vehicles and engines used in the program will be recorded and made available to EPA;

(iv) The manner in which results of the program will be recorded and made available to EPA;

(v) The manner in which information on the gasoline used in the program (including quantity, sulfur content, name, address, telephone number and contact person of the supplier, and the date received from the supplier), will be recorded and made available to EPA;

(vi) The manner in which distribution pumps will be labeled to insure proper use of the gasoline where appropriate;

(vii) The name, address, telephone number and title of the person(s) in the organization requesting an exemption from whom further information on the application may be obtained; and

(viii) The name, address, telephone number and title of the person(s) in the organization requesting an exemption

who is responsible for recording and making available the information specified in paragraphs (b)(4)(iii), (iv) and (v) of this section, and the location in which such information will be maintained.

(c) *Additional requirements.* (1) The product transfer documents associated with R&D gasoline must identify the gasoline as such, and must state that the gasoline is to be used only for research, development, or testing purposes.

(2) The R&D gasoline must be designated by the refiner or importer as exempt R&D gasoline.

(3) The R&D gasoline must be kept segregated from non-exempt gasoline at all points in the distribution system of the gasoline.

(4) The R&D gasoline must not be sold, distributed, offered for sale or distribution, dispensed, supplied, offered for supply, transported to or from, or stored by a gasoline retail outlet, or by a wholesale purchaser-consumer facility, unless the wholesale purchaser-consumer facility is associated with the R&D program that uses the gasoline.

(d) *Memorandum of exemption.* The Administrator will grant an R&D exemption upon a demonstration that the requirements of this section have been met. The R&D exemption will be granted in the form of a memorandum of exemption signed by the applicant and the Administrator (or delegate), which may include such terms and conditions as the Administrator determines necessary to monitor the exemption and to carry out the purposes of this section, including restoration of motor vehicle emissions control systems. Any violation of such a term or condition of the exemption or any requirement under this section will cause the exemption to be void ab initio.

(e) *Effects of exemption.* Gasoline that is subject to an R&D exemption under this section is exempt from other provisions of this subpart provided that the gasoline is used in a manner that complies with the memorandum of exemption granted under paragraph (d) of this section.

Violation Provisions

§ 80.385 What acts are prohibited under the gasoline sulfur program?

No person shall:

(a) *Averaging violation.* Produce or import gasoline that does not comply with the applicable sulfur average standard under § 80.195, § 80.216 or § 80.240.

(b) *Cap standard violation.* Produce, import, sell, offer for sale, dispense, supply, offer for supply, store or

transport gasoline that does not comply with the applicable sulfur cap standard under § 80.195, § 80.216, § 80.210, § 80.220 or § 80.240.

(c) *Causing an averaging, cap standard, or geographic phase-in area (GPA) use violation.* Cause another person to commit an act in violation of paragraph (a), (b), or (f) of this section.

(d) *Causing violating gasoline to be in the distribution system.* Cause gasoline to be in the distribution system which does not comply with an applicable sulfur cap standard under § 80.195, § 80.210, § 80.216, § 80.220 or § 80.240; a sulfur average standard under § 80.195, § 80.216 or § 80.240; or a GPA use prohibition under § 80.219(c).

(e) *Denatured ethanol violation.* Blend into gasoline denatured ethanol with a sulfur content higher than 30 ppm.

(f) *GPA use violation.* Produce, import, sell, offer for sale, dispense, supply, offer for supply, store or transport gasoline that does not comply with a GPA use prohibition under § 80.219(c).

§ 80.390 What evidence may be used to determine compliance with the prohibitions and requirements of this subpart and liability for violations of this subpart?

(a) Compliance with the sulfur standards of this subpart shall be determined based on the sulfur level of the gasoline, measured using the methodologies specified in §§ 80.330(b) and 80.46(a). Any evidence or information, including the exclusive use of such evidence or information, may be used to establish the sulfur level of gasoline if the evidence or information is relevant to whether the sulfur level of gasoline would have been in compliance with the standards if the appropriate sampling and testing methodology had been correctly performed. Such evidence may be obtained from any source or location and may include, but is not limited to, test results using methods other than those specified in §§ 80.330(b) and 80.46(a), business records, and commercial documents.

(b) Determinations of compliance with the requirements of this subpart other than the sulfur standards, and determinations of liability for any violation of this subpart, may be based on information obtained from any source or location. Such information may include, but is not limited to, business records and commercial documents.

§ 80.395 Who is liable for violations under the gasoline sulfur program?

(a) *Persons liable for violations of prohibited acts.* (1) *Averaging violation.*

Any refiner or importer who violates § 80.385(a) is liable for the violation.

(2) *Causing an averaging violation.* Any refiner, importer, distributor, reseller, carrier, retailer, wholesale purchaser-consumer, or oxygenate blender who causes another party to violate § 80.385(a), is liable for a violation of § 80.385(c).

(3) *Cap standard violation.* Any refiner, importer, distributor, reseller, carrier, retailer, wholesale purchaser-consumer, or oxygenate blender who owned, leased, operated, controlled or supervised a facility where a violation of § 80.385 (b) occurred, is deemed in violation of § 80.385(b).

(4) *Causing a cap standard violation.* Any refiner, importer, distributor, reseller, carrier, retailer, wholesale purchaser-consumer, or oxygenate blender who produced, imported, sold, offered for sale, dispensed, supplied, offered for supply, stored, transported, or caused the transportation or storage of gasoline that violates § 80.385(b), is deemed in violation of § 80.385(c).

(5) *GPA use violation.* Any refiner, importer, distributor, reseller, carrier, retailer, wholesale purchaser-consumer, or oxygenate blender who produced, imported, sold, offered for sale, dispensed, supplied, offer for supply, stored, transported, or caused the transportation or storage of gasoline that violates § 80.385(f), is deemed in violation of § 80.385(f).

(6) *Causing a GPA use violation.* Any refiner, importer, distributor, reseller, carrier, retailer, wholesale purchaser-consumer, or oxygenate blender who causes another party to violate § 80.385(f), is deemed liable for a violation of § 80.385(c).

(7) *Branded refiner/importer liability.* Any refiner or importer whose corporate, trade, or brand name, or whose marketing subsidiary's corporate, trade, or brand name appeared at a facility where a violation of § 80.385(b) or (f) occurred, is deemed in violation of § 80.385(b) or (f), as applicable.

(8) *Causing violating gasoline to be in the distribution system.* Any refiner, importer, distributor, reseller, carrier, or oxygenate blender, who owned, leased, operated, controlled or supervised a facility from which gasoline was released into the distribution system which does not comply with an applicable sulfur cap standard, a sulfur averaging standard, or a GPA use prohibition, is deemed in violation of § 80.385(d).

(9) *Carrier causation.* In order for a carrier to be liable under paragraph (a)(2), (4), (6), or (8) of this section, EPA must demonstrate, by reasonably specific showing by direct or

circumstantial evidence, that the carrier caused the violation.

(10) *Denatured ethanol violation.* Any oxygenate blender who violates § 80.385(e) is liable for the violation.

(11) *Parent corporation liability.* Any parent corporation is liable for any violations of this subpart that are committed by any of its wholly-owned subsidiaries.

(12) *Joint venture liability.* Each partner to a joint venture is jointly and severally liable for any violation of this subpart that occurs at the joint venture facility or is committed by the joint venture operation.

(b) *Persons liable for failure to meet other provisions of this subpart.* (1) Any refiner, importer, distributor, reseller, carrier, wholesale purchaser-consumer, retailer, or oxygenate blender who fails to meet a provision of this subpart not addressed in paragraph (a) of this section is liable for a violation of that provision.

(2) Any refiner, importer, distributor, reseller, carrier, wholesale purchaser-consumer, retailer, or oxygenate blender who caused another person to fail to meet a requirement of this subpart not addressed in paragraph (a) of this section, is liable for causing a violation of that provision.

§ 80.400 What defenses apply to persons deemed liable for a violation of a prohibited act?

(a) Any person deemed liable for a violation of a prohibition under § 80.395 (a)(3) through (8), will not be deemed in violation if the person demonstrates that:

(1) The violation was not caused by the person or the person's employee or agent; and

(2) The person conducted a quality assurance sampling and testing program, as described in paragraph (d) of this section. A carrier may rely on the quality assurance program carried out by another party, including the party who owns the gasoline in question, provided that the quality assurance program is carried out properly. Retailers and wholesale purchaser-consumers are not required to conduct quality assurance programs.

(b) In the case of a violation found at a facility operating under the corporate, trade or brand name of a refiner or importer, or a refiner's or importer's marketing subsidiary, the refiner or importer must show, in addition to the defense elements required under paragraphs (a)(1) and (2) of this section, that the violation was caused by:

(1) An act in violation of law (other than the Clean Air Act or this part 80), or an act of sabotage or vandalism;

(2) The action of any refiner, importer, retailer, distributor, reseller, oxygenate blender, carrier, retailer or wholesale purchaser-consumer in violation of a contractual agreement between the branded refiner or importer and the person designed to prevent such action, and despite periodic sampling and testing by the branded refiner or importer to ensure compliance with such contractual obligation; or

(3) The action of any carrier or other distributor not subject to a contract with the refiner or importer, but engaged for transportation of gasoline, despite specifications or inspections of procedures and equipment which are reasonably calculated to prevent such action.

(c) Under paragraph (a) of this section for any person to show that a violation was not caused by that person, or under paragraph (b) of this section to show that a violation was caused by any of the specified actions, the person must demonstrate by reasonably specific showing, by direct or circumstantial evidence, that the violation was caused or must have been caused by another person and that the person asserting the defense did not contribute to that other person's causation.

(d) *Quality assurance and testing program.* To demonstrate an acceptable quality assurance and testing program under paragraph (a)(2) of this section, a person must present evidence of the following:

(1) A periodic sampling and testing program to ensure the gasoline the person sold, dispensed, supplied, stored, or transported, meets the applicable sulfur standard; and

(2) On each occasion when gasoline is found not in compliance with the applicable sulfur standard:

(i) The person immediately ceases selling, offering for sale, dispensing, supplying, offering for supply, storing or transporting the non-complying product; and

(ii) The person promptly remedies the violation and the factors that caused the violation (for example, by removing the non-complying product from the distribution system until the applicable standard is achieved and taking steps to prevent future violations of a similar nature from occurring).

(3) For any carrier who transports gasoline in a tank truck, the quality assurance program required under this paragraph (d) need not include periodic sampling and testing of gasoline in the tank truck, but in lieu of such tank truck sampling and testing, the carrier shall demonstrate evidence of an oversight program for monitoring compliance with the requirements of this subpart

relating to the transport or storage of gasoline by tank truck, such as appropriate guidance to drivers regarding compliance with the applicable sulfur standard and product transfer document requirements, and the periodic review of records received in the ordinary course of business concerning gasoline quality and delivery.

§ 80.405 What penalties apply under this subpart?

(a) Any person liable for a violation under § 80.395 is subject to civil penalties as specified in section 205 of the Clean Air Act for every day of each such violation and the amount of economic benefit or savings resulting from each violation.

(b) Any person liable under § 80.395(a)(1) or (2) for a violation of the applicable sulfur averaging standard or causing another party to violate that standard during any averaging period, is subject to a separate day of violation for each and every day in the averaging period. Any person liable under § 80.395(b) for a failure to fulfill any requirement for credit or allotment generation, transfer, use, banking, or deficit correction, is subject to a separate day of violation for each and every day in the averaging period in which invalid credits or allotments are generated or used.

(c)(1) Any person liable under § 80.395(a)(3), (4), (5), or (6) for a violation of an applicable sulfur per gallon cap standard under § 80.195, § 80.210, § 80.216, § 80.220 or § 80.240, a GPA use prohibition under § 80.219(c), or of causing another party to violate a cap standard or a GPA use prohibition, is subject to a separate day of violation for each and every day the non-complying gasoline remains any place in the gasoline distribution system.

(2) Any person liable under § 80.395(a)(8) for causing gasoline to be in the distribution system which does not comply with an applicable sulfur cap standard, a sulfur averaging standard, or a GPA use prohibition, is subject to a separate day of violation for each and every day that the non-complying gasoline remains any place in the gasoline distribution system.

(3) For purposes of paragraph (c) of this section, the length of time the gasoline in question remained in the gasoline distribution system is deemed to be twenty-five days, unless a person subject to liability or EPA demonstrates by reasonably specific showings, by direct or circumstantial evidence, that the non-complying gasoline remained in the gasoline distribution system for

fewer than or more than twenty-five days.

(d) Any person liable under § 80.395(b) for failure to meet, or causing a failure to meet, a provision of this subpart is liable for a separate day of violation for each and every day such provision remains unfulfilled.

Provisions for Foreign Refiners With Individual Sulfur Baselines

§ 80.410 What are the additional requirements for gasoline produced at foreign refineries having individual small refiner sulfur baselines, foreign refineries granted temporary relief under § 80.270, or baselines for generating credits during 2000 through 2003?

(a) *Definitions.* (1) A foreign refinery is a refinery that is located outside the United States, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands (collectively referred to in this section as "the United States").

(2) A foreign refiner is a person who meets the definition of refiner under § 80.2(i) for a foreign refinery.

(3) A small foreign refiner is a refiner that meets the definition of a small refiner under § 80.225.

(4) "Sulfur-FRGAS" means gasoline produced at a foreign refinery that has been assigned an individual refinery sulfur baseline under §§ 80.250 or 80.295, or has been granted temporary relief under § 80.270, and that is imported into the United States.

(5) "Non-Sulfur-FRGAS" means gasoline that is produced at a foreign refinery that has not been assigned an individual refinery sulfur baseline, gasoline produced at a foreign refinery with an individual refinery sulfur baseline that is not imported into the United States, and gasoline produced at a foreign refinery with an individual sulfur baseline during a year when the foreign refiner has opted to not participate in the Sulfur-FRGAS program under paragraph (c)(3) of this section.

(6) "Certified Sulfur-FRGAS" means Sulfur-FRGAS the foreign refiner intends to include in the foreign refinery's sulfur compliance calculations under § 80.205 pursuant to § 80.240 or § 80.270 or credit calculations under §§ 80.305 or 80.310 and allotment calculations under § 80.275(a), and does include in these compliance calculations when reported to EPA.

(7) "Non-Certified Sulfur-FRGAS" means Sulfur-FRGAS that is not Certified Sulfur-FRGAS.

(b) *Baseline establishment.* Any foreign refiner who does not have an

approved refinery baseline under § 80.94 may submit a petition to the Administrator for an individual refinery sulfur baseline pursuant to §§ 80.245 and 80.250, a baseline for generating credits or allotments under §§ 80.290 and 80.295, or a baseline for temporary refinery relief under §§ 80.270 and 80.295.

(1) The refiner shall follow the procedures specified in §§ 80.91 through 80.93 to establish the volume and sulfur content of gasoline that was produced at the foreign refinery and imported into the United States during 1997 and 1998 for purposes of establishing baselines under § 80.250 or § 80.295.

(2) In making determinations for foreign refinery baselines EPA will consider all information supplied by a foreign refiner, and in addition may rely on any and all appropriate assumptions necessary to make such determinations.

(3) Where a foreign refiner submits a petition that is incomplete or inadequate to establish an accurate baseline, and the refiner fails to cure this defect after a request for more information, EPA will not assign an individual refinery sulfur baseline.

(c) *General requirements for foreign refineries with individual refinery sulfur baselines.* A foreign refiner of a refinery that has been assigned an individual sulfur baseline under § 80.250 or § 80.295 must designate all gasoline produced at the foreign refinery that is exported to the United States as either Certified Sulfur-FRGAS or as Non-Certified Sulfur-FRGAS, except as provided in paragraph (c)(3) of this section.

(1) In the case of Certified Sulfur-FRGAS, the foreign refiner must meet all provisions that apply to refineries under this subpart H.

(2) In the case of Non-Certified Sulfur-FRGAS, the foreign refiner shall meet all the following provisions, except the foreign refiner shall substitute the name Non-Certified Sulfur-FRGAS for the names "reformulated gasoline" or "RBOB" wherever they appear in the following provisions:

(i) The designation requirements in this section;

(ii) The recordkeeping requirements under § 80.365;

(iii) The reporting requirements in § 80.370 and this section;

(iv) The product transfer document requirements in this section;

(v) The prohibitions in this section and § 80.385; and

(vi) The independent audit requirements under § 80.415, paragraph (h) of this section, §§ 80.125 through

80.127, § 80.128(a),(b),(c),(g) through (i), and § 80.130.

(3)(i) Any foreign refiner that generates sulfur credits under § 80.305 during the period 2000 through 2003, or allotments under § 80.275(a) during 2003, and any small refiner generating credits under § 80.310, shall designate all Sulfur-FRGAS as Certified Sulfur-FRGAS for any year that such credits are generated.

(ii) Any foreign refiner that has been assigned an individual sulfur baseline for a foreign refinery under § 80.250 or § 80.295 may elect to classify no gasoline imported into the United States as Sulfur-FRGAS, provided the foreign refiner notifies EPA of the election no later than November 1 of the prior calendar year.

(iii) An election under paragraph (c)(3)(ii) of this section shall:

(A) Apply to an entire calendar year averaging period, and apply to all gasoline produced during the calendar year at the foreign refinery that is used in the United States; and

(B) Remain in effect for each succeeding calendar year averaging period, unless and until the foreign refiner notifies EPA of a termination of the election. The change in election shall take effect at the beginning of the next calendar year.

(d) *Designation, product transfer documents, and foreign refiner certification.* (1) Any foreign refiner of a foreign refinery that has been assigned an individual sulfur baseline must designate each batch of Sulfur-FRGAS as such at the time the gasoline is produced, unless the refiner has elected to classify no gasoline exported to the United States as Sulfur-FRGAS under paragraph (c)(3)(i) of this section.

(2) On each occasion when any person transfers custody or title to any Sulfur-FRGAS prior to its being imported into the United States, it must include the following information as part of the product transfer document information in this section:

(i) Identification of the gasoline as Certified Sulfur-FRGAS or as Non-Certified Sulfur-FRGAS; and

(ii) The name and EPA refinery registration number of the refinery where the Sulfur-FRGAS was produced.

(3) On each occasion when Sulfur-FRGAS is loaded onto a vessel or other transportation mode for transport to the United States, the foreign refiner shall prepare a certification for each batch of the Sulfur-FRGAS that meets the following requirements:

(i) The certification shall include the report of the independent third party under paragraph (f) of this section, and the following additional information:

(A) The name and EPA registration number of the refinery that produced the Sulfur-FRGAS;

(B) The identification of the gasoline as Certified Sulfur-FRGAS or Non-Certified Sulfur-FRGAS;

(C) The volume of Sulfur-FRGAS being transported, in gallons;

(D) In the case of Certified Sulfur-FRGAS:

(1) The sulfur content as determined under paragraph (f) of this section; and

(2) A declaration that the Sulfur-FRGAS is being included in the compliance calculations under § 80.205 or credit calculations under § 80.305 or allotments under § 80.275(a) for the refinery that produced the Sulfur-FRGAS.

(ii) The certification shall be made part of the product transfer documents for the Sulfur-FRGAS.

(e) *Transfers of Sulfur-FRGAS to non-United States markets.* The foreign refiner is responsible to ensure that all gasoline classified as Sulfur-FRGAS is imported into the United States. A foreign refiner may remove the Sulfur-FRGAS classification, and the gasoline need not be imported into the United States, but only if:

(1)(i) The foreign refiner excludes:

(A) The volume of gasoline from the refinery's compliance calculations under § 80.205; and

(B) In the case of Certified Sulfur-FRGAS, the volume and sulfur content of the gasoline from the compliance calculations under § 80.205 or credit calculations under § 80.305.

(ii) The exclusions under paragraph (e)(1)(i) of this section shall be on the basis of the sulfur content and volumes determined under paragraph (f) of this section; and

(2) The foreign refiner obtains sufficient evidence in the form of documentation that the gasoline was not imported into the United States.

(f) *Load port independent sampling, testing and refinery identification.* (1) On each occasion Sulfur-FRGAS is loaded onto a vessel for transport to the United States a foreign refiner shall have an independent third party:

(i) Inspect the vessel prior to loading and determine the volume of any tank bottoms;

(ii) Determine the volume of Sulfur-FRGAS loaded onto the vessel (exclusive of any tank bottoms present before vessel loading);

(iii) Obtain the EPA-assigned registration number of the foreign refinery;

(iv) Determine the name and country of registration of the vessel used to transport the Sulfur-FRGAS to the United States; and

(v) Determine the date and time the vessel departs the port serving the foreign refinery.

(2) On each occasion Certified Sulfur-FRGAS is loaded onto a vessel for transport to the United States a foreign refiner shall have an independent third party:

(i) Collect a representative sample of the Certified Sulfur-FRGAS from each vessel compartment subsequent to loading on the vessel and prior to departure of the vessel from the port serving the foreign refinery;

(ii) Prepare a volume-weighted vessel composite sample from the compartment samples, and determine the value for sulfur using the methodology specified in § 80.330 by:

(A) The third party analyzing the sample; or

(B) The third party observing the foreign refiner analyze the sample;

(iii) Review original documents that reflect movement and storage of the certified Sulfur-FRGAS from the refinery to the load port, and from this review determine:

(A) The refinery at which the Sulfur-FRGAS was produced; and

(B) That the Sulfur-FRGAS remained segregated from:

(1) Non-Sulfur-FRGAS and Non-Certified Sulfur-FRGAS; and

(2) Other Certified Sulfur-FRGAS produced at a different refinery.

(3) The independent third party shall submit a report:

(i) To the foreign refiner containing the information required under paragraphs (f)(1) and (2) of this section, to accompany the product transfer documents for the vessel; and

(ii) To the Administrator containing the information required under paragraphs (f)(1) and (2) of this section, within thirty days following the date of the independent third party's inspection. This report shall include a description of the method used to determine the identity of the refinery at which the gasoline was produced, assurance that the gasoline remained segregated as specified in paragraph (n)(1) of this section, and a description of the gasoline's movement and storage between production at the source refinery and vessel loading.

(4) The independent third party must:

(i) Be approved in advance by EPA, based on a demonstration of ability to perform the procedures required in this paragraph (f);

(ii) Be independent under the criteria specified in § 80.65(e)(2)(iii); and

(iii) Sign a commitment that contains the provisions specified in paragraph (i) of this section with regard to activities, facilities and documents relevant to

compliance with the requirements of this paragraph (f).

(g) *Comparison of load port and port of entry testing.* (1)(i) Except as described in paragraph (g)(1)(ii) of this section, any foreign refiner and any United States importer of Certified Sulfur-FRGAS shall compare the results from the load port testing under paragraph (f) of this section, with the port of entry testing as reported under paragraph (o) of this section, for the volume of gasoline and the sulfur value.

(ii) Where a vessel transporting Certified Sulfur-FRGAS off loads this gasoline at more than one United States port of entry, and the conditions of paragraph (g)(2)(i) of this section are met at the first United States port of entry, the requirements of paragraph (g)(2) of this section do not apply at subsequent ports of entry if the United States importer obtains a certification from the vessel owner, that meets the requirements of paragraph (s) of this section, that the vessel has not loaded any gasoline or blendstock between the first United States port of entry and the subsequent port of entry.

(2)(i) The requirements of this paragraph (g)(2) apply if:

(A) The temperature-corrected volumes determined at the port of entry and at the load port differ by more than one percent; or

(B) The sulfur value determined at the port of entry is higher than the sulfur value determined at the load port, and the amount of this difference is greater than the reproducibility amount specified for the port of entry test result by the American Society of Testing and Materials (ASTM).

(ii) The United States importer and the foreign refiner shall treat the gasoline as Non-Certified Sulfur-FRGAS, and the foreign refiner shall exclude the gasoline volume and properties from its gasoline sulfur compliance calculations under § 80.205.

(h) *Attest requirements.* The following additional procedures shall be carried out by any foreign refiner of Sulfur-FRGAS as part of the applicable attest engagement for each foreign refinery under § 80.415:

(1) The inventory reconciliation analysis under § 80.128(b) and the tender analysis under § 80.128(c) shall include Non-Sulfur-FRGAS in addition to the gasoline types listed in § 80.128(b) and (c).

(2) Obtain separate listings of all tenders of Certified Sulfur-FRGAS, and of Non-Certified Sulfur-FRGAS. Agree the total volume of tenders from the listings to the gasoline inventory reconciliation analysis in § 80.128(b), and to the volumes determined by the

third party under paragraph (f)(1) of this section.

(3) For each tender under paragraph (h)(2) of this section where the gasoline is loaded onto a marine vessel, report as a finding the name and country of registration of each vessel, and the volumes of Sulfur-FRGAS loaded onto each vessel.

(4) Select a sample from the list of vessels identified in paragraph (h)(3) of this section used to transport Certified Sulfur-FRGAS, in accordance with the guidelines in § 80.127, and for each vessel selected perform the following:

(i) Obtain the report of the independent third party, under paragraph (f) of this section, and of the United States importer under paragraph (o) of this section.

(A) Agree the information in these reports with regard to vessel identification, gasoline volumes and test results.

(B) Identify, and report as a finding, each occasion the load port and port of entry parameter and volume results differ by more than the amounts allowed in paragraph (g) of this section, and determine whether the foreign refiner adjusted its refinery calculations as required in paragraph (g) of this section.

(ii) Obtain the documents used by the independent third party to determine transportation and storage of the Certified Sulfur-FRGAS from the refinery to the load port, under paragraph (f) of this section. Obtain tank activity records for any storage tank where the Certified Sulfur-FRGAS is stored, and pipeline activity records for any pipeline used to transport the Certified Sulfur-FRGAS, prior to being loaded onto the vessel. Use these records to determine whether the Certified Sulfur-FRGAS was produced at the refinery that is the subject of the attest engagement, and whether the Certified Sulfur-FRGAS was mixed with any Non-Certified Sulfur-FRGAS, Non-Sulfur-FRGAS, or any Certified Sulfur-FRGAS produced at a different refinery.

(5)(i) Select a sample from the list of vessels identified in paragraph (h)(3) of this section used to transport certified and Non-Certified Sulfur-FRGAS, in accordance with the guidelines in § 80.127, and for each vessel selected perform the following:

(ii) Obtain a commercial document of general circulation that lists vessel arrivals and departures, and that includes the port and date of departure of the vessel, and the port of entry and date of arrival of the vessel. Agree the vessel's departure and arrival locations and dates from the independent third party and United States importer reports

to the information contained in the commercial document.

(6) Obtain separate listings of all tenders of Non-Sulfur-FRGAS, and perform the following:

(i) Agree the total volume of tenders from the listings to the gasoline inventory reconciliation analysis in § 80.128(b).

(ii) Obtain a separate listing of the tenders under paragraph (h)(6) of this section where the gasoline is loaded onto a marine vessel. Select a sample from this listing in accordance with the guidelines in § 80.127, and obtain a commercial document of general circulation that lists vessel arrivals and departures, and that includes the port and date of departure and the ports and dates where the gasoline was off loaded for the selected vessels. Determine and report as a finding the country where the gasoline was off loaded for each vessel selected.

(7) In order to complete the requirements of this paragraph (h) an auditor shall:

(i) Be independent of the foreign refiner;

(ii) Be licensed as a Certified Public Accountant in the United States and a citizen of the United States, or be approved in advance by EPA based on a demonstration of ability to perform the procedures required in §§ 80.125 through 80.130 and this paragraph (h); and

(iii) Sign a commitment that contains the provisions specified in paragraph (i) of this section with regard to activities and documents relevant to compliance with the requirements of §§ 80.125 through 80.130, § 80.415 and this paragraph (h).

(i) *Foreign refiner commitments.* Any foreign refiner shall commit to and comply with the provisions contained in this paragraph (i) as a condition to being assigned an individual refinery sulfur baseline.

(1) Any United States Environmental Protection Agency inspector or auditor will be given full, complete and immediate access to conduct inspections and audits of the foreign refinery.

(i) Inspections and audits may be either announced in advance by EPA, or unannounced.

(ii) Access will be provided to any location where:

(A) Gasoline is produced;

(B) Documents related to refinery operations are kept;

(C) Gasoline or blendstock samples are tested or stored; and

(D) Sulfur-FRGAS is stored or transported between the foreign refinery

and the United States, including storage tanks, vessels and pipelines.

(iii) Inspections and audits may be by EPA employees or contractors to EPA.

(iv) Any documents requested that are related to matters covered by inspections and audits will be provided to an EPA inspector or auditor on request.

(v) Inspections and audits by EPA may include review and copying of any documents related to:

(A) Refinery baseline establishment, including the volume and sulfur content, and transfers of title or custody, of any gasoline or blendstocks, whether Sulfur-FRGAS or Non-Sulfur-FRGAS, produced at the foreign refinery during the period January 1, 1997 through the date of the refinery baseline petition or through the date of the inspection or audit if a baseline petition has not been approved, and any work papers related to refinery baseline establishment;

(B) The volume and sulfur content of Sulfur-FRGAS;

(C) The proper classification of gasoline as being Sulfur-FRGAS or as not being Sulfur-FRGAS, or as Certified Sulfur-FRGAS or as Non-Certified Sulfur-FRGAS;

(D) Transfers of title or custody to Sulfur-FRGAS;

(E) Sampling and testing of Sulfur-FRGAS;

(F) Work performed and reports prepared by independent third parties and by independent auditors under the requirements of this section and § 80.415 including work papers; and

(G) Reports prepared for submission to EPA, and any work papers related to such reports.

(vi) Inspections and audits by EPA may include taking samples of gasoline or blendstock, and interviewing employees.

(vii) Any employee of the foreign refinery will be made available for interview by the EPA inspector or auditor, on request, within a reasonable time period.

(viii) English language translations of any documents will be provided to an EPA inspector or auditor, on request, within 10 working days.

(ix) English language interpreters will be provided to accompany EPA inspectors and auditors, on request.

(2) An agent for service of process located in the District of Columbia will be named, and service on this agent constitutes service on the foreign refinery or any employee of the foreign refinery for any action by EPA or otherwise by the United States related to the requirements of this subpart H.

(3) The forum for any civil or criminal enforcement action related to the

provisions of this section for violations of the Clean Air Act or regulations promulgated thereunder shall be governed by the Clean Air Act, including the EPA administrative forum where allowed under the Clean Air Act.

(4) United States substantive and procedural laws shall apply to any civil or criminal enforcement action against the foreign refinery or any employee of the foreign refinery related to the provisions of this section.

(5) Submitting a petition for an individual refinery sulfur baseline, producing and exporting gasoline under an individual refinery sulfur baseline, and all other actions to comply with the requirements of this subpart H relating to the establishment and use of an individual refinery sulfur baseline constitute actions or activities that satisfy the provisions of 28 U.S.C. section 1605(a)(2), but solely with respect to actions instituted against the foreign refinery, its agents and employees in any court or other tribunal in the United States for conduct that violates the requirements applicable to the foreign refinery under this subpart H, including conduct that violates Title 18 U.S.C. section 1001 and Clean Air Act section 113(c)(2).

(6) The foreign refinery, or its agents or employees, will not seek to detain or to impose civil or criminal remedies against EPA inspectors or auditors, whether EPA employees or EPA contractors, for actions performed within the scope of EPA employment related to the provisions of this section.

(7) The commitment required by this paragraph (i) shall be signed by the owner or president of the foreign refinery business.

(8) In any case where Sulfur-FRGAS produced at a foreign refinery is stored or transported by another company between the refinery and the vessel that transports the Sulfur-FRGAS to the United States, the foreign refinery shall obtain from each such other company a commitment that meets the requirements specified in paragraphs (i)(1) through (7) of this section, and these commitments shall be included in the foreign refinery's baseline petition.

(j) *Sovereign immunity.* By submitting a petition for an individual foreign refinery baseline under this section, or by producing and exporting gasoline to the United States under an individual refinery sulfur baseline under this section, the foreign refinery, its agents and employees, without exception, become subject to the full operation of the administrative and judicial enforcement powers and provisions of the United States without limitation based on sovereign immunity, with

respect to actions instituted against the foreign refinery, its agents and employees in any court or other tribunal in the United States for conduct that violates the requirements applicable to the foreign refinery under this subpart H, including conduct that violates Title 18 U.S.C. section 1001 and Clean Air Act section 113(c)(2).

(k) *Bond posting.* Any foreign refinery shall meet the requirements of this paragraph (k) as a condition to being assigned an individual refinery sulfur baseline.

(l) The foreign refinery shall post a bond of the amount calculated using the following equation:

$$\text{Bond} = G \times \$ 0.01$$

where:

Bond = amount of the bond in U. S. dollars.

G = the largest volume of gasoline produced at the foreign refinery and exported to the United States, in gallons, during a single calendar year among the most recent of the following calendar years, up to a maximum of five calendar years: the calendar year immediately preceding the date the baseline petition is submitted, the calendar year the baseline petition is submitted, and each succeeding calendar year.

(2) Bonds shall be posted by:

(i) Paying the amount of the bond to the Treasurer of the United States;

(ii) Obtaining a bond in the proper amount from a third party surety agent that is payable to satisfy United States administrative or judicial judgments against the foreign refinery, provided EPA agrees in advance as to the third party and the nature of the surety agreement; or

(iii) An alternative commitment that results in assets of an appropriate liquidity and value being readily available to the United States, provided EPA agrees in advance as to the alternative commitment.

(3) If the bond amount for a foreign refinery increases, the foreign refinery shall increase the bond to cover the shortfall within 90 days of the date the bond amount changes. If the bond amount decreases, the foreign refinery may reduce the amount of the bond beginning 90 days after the date the bond amount changes.

(4) Bonds posted under this paragraph (k) shall:

(i) Be used to satisfy any judicial judgment that results from an administrative or judicial enforcement action for conduct in violation of this subpart H, including where such conduct violates Title 18 U.S.C. section

1001 and Clean Air Act section 113(c)(2);

(ii) Be provided by a corporate surety that is listed in the United States Department of Treasury Circular 570 "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and Acceptable Reinsuring Companies" (Available from the U.S. Department of the Treasury, Financial Management Service, Surety Bond Branch, 3700 East-West Highway, Room 6A04, Hyattsville, Md. 20782. Also available on the internet at <http://www.fms.treas.gov/c570/c570.html>); and

(iii) Include a commitment that the bond will remain in effect for at least five (5) years following the end of latest averaging period that the foreign refiner produces gasoline pursuant to the requirements of this Subpart H.

(5) On any occasion a foreign refiner bond is used to satisfy any judgment, the foreign refiner shall increase the bond to cover the amount used within 90 days of the date the bond is used.

(l) [Reserved]

(m) *English language reports.* Any report or other document submitted to EPA by an foreign refiner shall be in English language, or shall include an English language translation.

(n) *Prohibitions.* (1) No person may combine Certified Sulfur-FRGAS with any Non-Certified Sulfur-FRGAS or Non-Sulfur-FRGAS, and no person may combine Certified Sulfur-FRGAS with any Certified Sulfur-FRGAS produced at a different refinery, until the importer has met all the requirements of paragraph (o) of this section, except as provided in paragraph (e) of this section.

(2) No foreign refiner or other person may cause another person to commit an action prohibited in paragraph (n)(1) of this section, or that otherwise violates the requirements of this section.

(o) *United States importer requirements.* Any United States importer shall meet the following requirements:

(1) Each batch of imported gasoline shall be classified by the importer as being Sulfur-FRGAS or as Non-Sulfur-FRGAS, and each batch classified as Sulfur-FRGAS shall be further classified as Certified Sulfur-FRGAS or as Non-certified Sulfur-FRGAS.

(2) Gasoline shall be classified as Certified Sulfur-FRGAS or as Non-Certified Sulfur-FRGAS according to the designation by the foreign refiner if this designation is supported by product transfer documents prepared by the foreign refiner as required in paragraph (d) of this section, unless the gasoline is classified as Non-Certified Sulfur-

FRGAS under paragraph (g) of this section.

(3) For each gasoline batch classified as Sulfur-FRGAS, any United States importer shall perform the following procedures:

(i) In the case of both Certified and Non-Certified Sulfur-FRGAS, have an independent third party:

(A) Determine the volume of gasoline in the vessel;

(B) Use the foreign refiner's Sulfur-FRGAS certification to determine the name and EPA-assigned registration number of the foreign refinery that produced the Sulfur-FRGAS;

(C) Determine the name and country of registration of the vessel used to transport the Sulfur-FRGAS to the United States; and

(D) Determine the date and time the vessel arrives at the United States port of entry.

(ii) In the case of Certified Sulfur-FRGAS, have an independent third party:

(A) Collect a representative sample from each vessel compartment subsequent to the vessel's arrival at the United States port of entry and prior to off loading any gasoline from the vessel;

(B) Prepare a volume-weighted vessel composite sample from the compartment samples; and

(C) Determine the sulfur value using the methodologies specified in § 80.330, by:

(1) The third party analyzing the sample; or

(2) The third party observing the importer analyze the sample.

(4) Any importer shall submit reports within thirty days following the date any vessel transporting Sulfur-FRGAS arrives at the United States port of entry:

(i) To the Administrator containing the information determined under paragraph (o)(3) of this section; and

(ii) To the foreign refiner containing the information determined under paragraph (o)(3)(ii) of this section.

(5)(i) Any United States importer shall meet the requirements specified in § 80.195 for any imported gasoline that is not classified as Certified Sulfur-FRGAS under paragraph (o)(2) of this section.

(p) *Truck imports of Certified Sulfur-FRGAS produced at a small refinery.* (1) Any refiner whose Certified Sulfur-FRGAS is transported into the United States by truck may petition EPA to use alternative procedures to meet the following requirements:

(i) Certification under paragraph (d)(5) of this section;

(ii) Load port and port of entry sampling and testing under paragraphs (f) and (g) of this section;

(iii) Attest under paragraph (h) of this section; and

(iv) Importer testing under paragraph (o)(3) of this section.

(2) These alternative procedures must ensure Certified Sulfur-FRGAS remains segregated from Non-Certified Sulfur-FRGAS and from Non-Sulfur-FRGAS until it is imported into the United States. The petition will be evaluated based on whether it adequately addresses the following:

(i) Provisions for monitoring pipeline shipments, if applicable, from the refinery, that ensure segregation of Certified Sulfur-FRGAS from that refinery from all other gasoline;

(ii) Contracts with any terminals and/or pipelines that receive and/or transport Certified Sulfur-FRGAS, that prohibit the commingling of Certified Sulfur-FRGAS with any of the following:

(A) Other Certified Sulfur-FRGAS from other refineries;

(B) All Non-Certified Sulfur-FRGAS;

or

(C) All Non-Sulfur-FRGAS;

(iii) Procedures for obtaining and reviewing truck loading records and United States import documents for Certified Sulfur-FRGAS to ensure that such gasoline is only loaded into trucks making deliveries to the United States; and

(iv) Attest procedures to be conducted annually by an independent third party that review loading records and import documents based on volume reconciliation, or other criteria, to confirm that all Certified Sulfur-FRGAS remains segregated throughout the distribution system and is only loaded into trucks for import into the United States.

(3) The petition required by this section must be submitted to EPA along with the application for small refiner status and individual refinery sulfur baseline and standards under § 80.240 and this section.

(q) *Withdrawal or suspension of a foreign refinery's baseline.* EPA may withdraw or suspend a baseline that has been assigned to a foreign refinery where:

(1) A foreign refiner fails to meet any requirement of this section;

(2) A foreign government fails to allow EPA inspections as provided in paragraph (i)(1) of this section;

(3) A foreign refiner asserts a claim of, or a right to claim, sovereign immunity in an action to enforce the requirements in this subpart H; or

(4) A foreign refiner fails to pay a civil or criminal penalty that is not satisfied using the foreign refiner bond specified in paragraph (k) of this section.

(r) *Early use of a foreign refinery baseline.* (1) A foreign refiner may begin using an individual refinery baseline before EPA has approved the baseline, provided that:

(i) A baseline petition has been submitted as required in paragraph (b) of this section;

(ii) EPA has made a provisional finding that the baseline petition is complete;

(iii) The foreign refiner has made the commitments required in paragraph (i) of this section;

(iv) The persons who will meet the independent third party and independent attest requirements for the foreign refinery have made the commitments required in paragraphs (f)(3)(iii) and (h)(7)(iii) of this section; and

(v) The foreign refiner has met the bond requirements of paragraph (k) of this section.

(2) In any case where a foreign refiner uses an individual refinery baseline before final approval under paragraph (r)(1) of this section, and the foreign refinery baseline values that ultimately are approved by EPA are more stringent than the early baseline values used by the foreign refiner, the foreign refiner shall recalculate its compliance, ab initio, using the baseline values approved by EPA, and the foreign refiner shall be liable for any resulting violation of the conventional gasoline requirements.

(s) *Additional requirements for petitions, reports and certificates.* Any petition for a refinery baseline under § 80.250 or § 80.295, any alternative procedures under paragraph (r) of this section, any report or other submission required by paragraphs (c), (f)(2), or (i) of this section, and any certification under paragraph (d)(3) of this section shall be:

(1) Submitted in accordance with procedures specified by the Administrator, including use of any forms that may be specified by the Administrator; and

(2) Be signed by the president or owner of the foreign refiner company, or by that person's immediate designee, and shall contain the following declaration:

I hereby certify: (1) that I have actual authority to sign on behalf of and to bind [insert name of foreign refiner] with regard to all statements contained herein; (2) that I am aware that the information contained herein is being certified, or submitted to the United States Environmental Protection Agency, under the requirements of 40 CFR, Part 80, subpart H, and that the information is material for determining compliance under these regulations; and (3) that I have read and

understand the information being certified or submitted, and this information is true, complete and correct to the best of my knowledge and belief after I have taken reasonable and appropriate steps to verify the accuracy thereof.

I affirm that I have read and understand the provisions of 40 CFR Part 80, subpart H, including 40 CFR 80.410 [insert name of foreign refiner]. Pursuant to Clean Air Act section 113(c) and Title 18, United States Code, section 1001, the penalty for furnishing false, incomplete or misleading information in this certification or submission is a fine of up to \$10,000, and/or imprisonment for up to five years.

Attest Engagements

§ 80.415 What are the attest engagement requirements for gasoline sulfur compliance applicable to refiners and importers?

In addition to the requirements for attest engagements that apply to refiners and importers under §§ 80.125 through 80.130, and § 80.410, the attest engagements for importers and refiners must include the following procedures and requirements each year.

(a) *Baseline.* (1) Obtain the EPA sulfur baseline approval letter for the refinery to determine the refinery's applicable sulfur baseline and baseline volume under §§ 80.250 or 80.295.

(2) If the year being reviewed is 2004 through 2006 (2007 for refineries with small refiner status) and the refinery or importer produced or imported any GPA gasoline under § 80.216 or the refiner has approved status for a small refinery:

(i) Obtain the refinery's annual sulfur reports for 2000 through 2003; and

(ii) Determine whether the annual average sulfur level for any year credits were generated for 2000 through 2003 was less than the baseline level under paragraph (a)(1) of this section.

(3) If the annual average sulfur content for any year credits were created for 2000 through 2003 was less than the baseline level under paragraph (a)(1) of this section, report as a finding the lowest annual sulfur level as the new baseline value. For GPA gasoline add 30 ppm to obtain the GPA standard, not to exceed 150 ppm.

(4) If the refinery being reviewed is a small refinery and the annual volume under paragraph (b)(2) of this section is greater than the baseline volume, calculate the applicable standard in accordance with § 80.240(c).

(5) Obtain a written representation from the company representative stating the sulfur value that the company used as its baseline and agree that number to paragraphs (a)(1) through (a)(4) of this section and to the reports to EPA.

(b) *EPA reports.* (1) Obtain and read a copy of the refinery's or importer's

annual sulfur reports filed with EPA for the year.

(2) Agree the yearly volume of gasoline reported to EPA in the sulfur reports with the inventory reconciliation analysis under § 80.128.

(3) For the years 2004 through 2006, calculate the annual volume and average sulfur level for gasoline classified as GPA gasoline under §§ 80.216 and 80.219, and calculate the annual volume and average sulfur level for gasoline not classified as GPA gasoline, and agree these values with the values reported to EPA.

(4) Except as provided in paragraph (b)(3) of this section, calculate the annual average sulfur level for all gasoline and agree that value with the value reported to EPA.

(5) Obtain and read a copy of the refinery's or importer's sulfur credit report.

(c) *Credit generation before 2004.* In the case of a refinery that only generates credits during 2000 through 2003:

(1) Obtain a written representation from the company representative stating the refinery produces gasoline from crude oil.

(2) Compute and report as a finding the sulfur baseline from paragraph (a) of this section multiplied by 0.9.

(3) Obtain the annual average sulfur level from paragraph (b)(4) of this section.

(4) If the sulfur value under paragraph (c)(3) of this section is less than the sulfur value under paragraph (c)(2) of this section, compute and report as a finding the difference between the annual average sulfur level and the refinery's sulfur baseline from paragraph (a) of this section.

(5) Compute and report as a finding the total number of sulfur credits generated by multiplying the value in paragraph (c)(4) of this section by the volume of gasoline in paragraph (b)(2) of this section, and agree this value with the value reported to EPA.

(d) *Credit generation in 2004 and thereafter.* The following procedures shall be completed for a refinery or importer that generates credits in 2004 and thereafter:

(1) Obtain the annual average sulfur level for gasoline not classified as GPA from paragraph (b)(3) of this section.

(2) If the sulfur value under paragraph (d)(1) of this section is less than 30 ppm, compute and report as a finding the difference between the sulfur level under paragraph (d)(1) of this section and 30 ppm.

(3) Compute and report as a finding the total number of sulfur credits generated by multiplying the value calculated in paragraph (d)(2) of this

section by the volume of gasoline not classified as GPA in paragraph (b)(3) of this section, and agree this number with the number reported to EPA.

(4) Obtain the annual average sulfur level for gasoline classified as GPA from paragraph (b)(3) of this section.

(5) If the sulfur value under paragraph (d)(4) of this section is less than the applicable level under § 80.310, compute and report as a finding the difference between the sulfur level under paragraph (d)(4) of this section and the appropriate level in § 80.310.

(6) Compute and report as a finding the total number of sulfur credits generated by multiplying the value calculated in paragraph (d)(5) of this section by the volume of gasoline classified as GPA in paragraph (b)(3) of this section, and agree this number with the number reported to EPA.

(7) If the refiner has an approved status as a small refinery, obtain the annual average sulfur level for gasoline from paragraph (b)(4) of this section.

(8) If the sulfur value under paragraph (d)(7) of this section is less than the applicable standard under § 80.240, compute and report as a finding the difference between the sulfur level under paragraph (d)(7) of this section and the appropriate standard under § 80.240.

(9) Compute and report as a finding the total number of sulfur credits generated by multiplying the value calculated in paragraph (d)(8) of this section by the volume of gasoline in paragraph (b)(4) of this section, and agree this number with the number reported to EPA.

(e) *Credit purchases and sales.* The following attest procedures shall be completed for a refinery or importer that is a transferor or transferee of credits during an averaging period:

(1) Obtain contracts or other documents for all credits transferred to another refinery or importer during the year being reviewed; compute and report as a finding the number and year of creation of credits represented in these documents as being transferred away; and agree with the report to EPA.

(2) Obtain contracts or other documents for all credits received during the year being reviewed; compute and report as a finding the number and year of creation of credits represented in these documents as being received; and agree with the report to EPA.

(f) *Credits required for non-GPA gasoline.* The following attest procedures shall be completed for refineries and importers in 2005 and thereafter (2004 and thereafter for

refineries having standards under § 80.240):

(1) Obtain the annual average sulfur level for gasoline not classified as GPA from paragraph (b)(3) of this section.

(2) If the value in paragraph (f)(1) of this section is greater than 30 ppm (or greater than the small refinery standard), compute and report as a finding the difference between 30 ppm (or the standard under § 80.240) and the value in paragraph (f)(1) of this section.

(3) Compute and report as a finding the total sulfur credits required by multiplying the value in paragraph (f)(2) of this section times the volume of gasoline not classified as GPA in paragraph (b)(3) of this section, and agree with the report to EPA.

(4) Obtain the refiner's or importer's representation as to the portion of the deficit under paragraph (f)(3) of this section that was resolved with credits, the portion that was resolved with allotments in 2005 only or that was carried forward as a deficit under § 80.205, and agree with the report to EPA (refineries subject to standards under § 80.240 cannot carry deficits forward).

(g) *Credits required for GPA gasoline.* The following attest procedures shall be completed in 2004 through 2006 for a refinery or importer that produces gasoline subject to the geographic phase-in area standards under § 80.216:

(1) Obtain the annual average sulfur level for the refinery's or importer's GPA gasoline from paragraph (b)(3) of this section.

(2) If the value in paragraph (g)(1) of this section is greater than the refinery's or importer's baseline plus 30 ppm under § 80.216, as determined in paragraph (a) of this section or 150 ppm, whichever is less, compute and report as a finding the difference between the annual average sulfur level and the baseline level plus 30 ppm, or 150 ppm, whichever is less.

(3) Compute and report as a finding the total sulfur credits and/or allotments required by multiplying the value in paragraph (g)(2) of this section times the volume of GPA gasoline from paragraph (b)(3) of this section.

(4) Obtain the refiner's or importer's representation as to the portion of the deficit under paragraph (g)(3) of this section that was resolved with credits, or the portion that was resolved with allotments in 2004 or 2005 only (compliance deficits for GPA gasoline cannot be carried forward).

(h) *Credit expiration.* The following attest procedures shall be completed for a refinery or importer that possesses credits during an averaging period:

(1) Obtain a list of all credits in the refiner's or importer's possession at any time during the year being reviewed, identified by the year of creation of the credits.

(2) If the year being reviewed is 2006 and thereafter, except in the case of gasoline produced for use in the GPA and gasoline produced by small refineries, determine whether any credits identified in paragraph (h)(1) of this section or Type A sulfur allotments created under paragraph (i) of this section and converted to credits were created before 2004, and if so, report as a finding this number of expired credits.

(3) If the year being reviewed is 2008 and thereafter, determine whether any credits identified in paragraph (h)(1) of this section or Type B sulfur allotments created under paragraph (i) of this section and converted to credits were created more than 5 years before the year being reviewed, and if so, report as a finding this number of expired credits (for example, unused credits created during the 2004 averaging period expire at the end of the 2009 averaging period).

(i) *Optional credit and allotment generation in 2003.* The following requirements apply to any refinery that generates credits and allotments in 2003 under § 80.275(a):

(1) Obtain a written representation from the company representative stating the refinery produces gasoline from crude oil.

(2) Obtain the refinery baseline value from paragraph (b)(1) of this section, the annual volume from paragraph (b)(2) of this section and the annual average sulfur level from paragraph (b)(4) of this section.

(3) Based on the annual sulfur level and refinery baseline, determine which equation under § 80.275(a)(2) applies.

(4) Using the applicable equations under § 80.275(a)(2), recalculate the sulfur allotments, by type, and credits and report as a finding.

(j) *Credit reconciliation.* The following attest procedures shall be completed each year credits were in the refiner's or importer's possession at any time during the year:

(1) Obtain the credits remaining or the credit deficit from the previous year from the refiner's or importer's report to EPA for the previous year.

(2) Compute and report as a finding the net credits remaining at the conclusion of the year being reviewed by totaling:

(i) Credits remaining from the previous year; plus

(ii) Credits generated under paragraphs (c), (d) and (i) of this section; plus